

# PROBLEMS AND ISSUES WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

---

## HEARING BEFORE THE COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

MARCH 18, 1998, WASHINGTON, DC

---

**Serial No. 105-102**

---

Printed for the use of the Committee on Resources



Available via the World Wide Web: <http://www.access.gpo.gov/congress/house>  
or  
Committee address: <http://www.house.gov/resources>

U.S. GOVERNMENT PRINTING OFFICE

47-866 CC =

WASHINGTON : 1998

## COMMITTEE ON RESOURCES

DON YOUNG, Alaska, *Chairman*

W.J. (BILLY) TAUZIN, Louisiana	GEORGE MILLER, California
JAMES V. HANSEN, Utah	EDWARD J. MARKEY, Massachusetts
JIM SEXTON, New Jersey	NICK J. RAHALL II, West Virginia
ELTON GALLEGLY, California	BRUCE F. VENTO, Minnesota
JOHN J. DUNCAN, Jr., Tennessee	DALE E. KILDEE, Michigan
JOEL HEFLEY, Colorado	PETER A. DeFAZIO, Oregon
JOHN T. DOOLITTLE, California	ENI F.H. FALEOMAVAEGA, American Samoa
WAYNE T. GILCHREST, Maryland	NEIL ABERCROMBIE, Hawaii
KEN CALVERT, California	SOLOMON P. ORTIZ, Texas
RICHARD W. POMBO, California	OWEN B. PICKETT, Virginia
BARBARA CUBIN, Wyoming	FRANK PALLONE, Jr., New Jersey
HELEN CHENOWETH, Idaho	CALVIN M. DOOLEY, California
LINDA SMITH, Washington	CARLOS A. ROMERO-BARCELO, Puerto Rico
GEORGE P. RADANOVICH, California	MAURICE D. HINCHEY, New York
WALTER B. JONES, Jr., North Carolina	ROBERT A. UNDERWOOD, Guam
WILLIAM M. (MAC) THORNBERRY, Texas	SAM FARR, California
JOHN SHADEGG, Arizona	PATRICK J. KENNEDY, Rhode Island
JOHN E. ENSIGN, Nevada	ADAM SMITH, Washington
ROBERT F. SMITH, Oregon	WILLIAM D. DELAHUNT, Massachusetts
CHRIS CANNON, Utah	CHRIS JOHN, Louisiana
KEVIN BRADY, Texas	DONNA CHRISTIAN-GREEN, Virgin Islands
JOHN PETERSON, Pennsylvania	RON KIND, Wisconsin
RICK HILL, Montana	LLOYD DOGGETT, Texas
BOB SCHAFER, Colorado	
JIM GIBBONS, Nevada	
MICHAEL D. CRAPO, Idaho	

LLOYD A. JONES, *Chief of Staff*

ELIZABETH MEGGINSON, *Chief Counsel*

CHRISTINE KENNEDY, *Chief Clerk/Administrator*

JOHN LAWRENCE, *Democratic Staff Director*

## CONTENTS

Hearing held March 18, 1998 .....	Page 1
Statement of Members:	
Chenoweth, Hon. Helen, a Representative in Congress from the State of Idaho .....	3
Prepared statement of .....	4
Letter of Robert S. Lynch .....	79
Texas "blowdown" letters, press releases and reports .....	227
Cubin, Hon. Barbara, a Representative in Congress from the State of Wyoming .....	2
Prepared statement of .....	2
Pallone, Hon. Frank, Jr., a Representative in Congress from the State of New Jersey .....	5
Prepared statement of .....	6
Chronology of Port Newark/Elizabeth Dredging Permit .....	216
Statement of Witnesses:	
Allen, Randy, General Counsel, River Gas Corporation, Northport, Ala- bama .....	50
Prepared statement of .....	79
Byrne, Michael J., Vice Chairman of the Federal Lands Committee, Na- tional Cattlemen's Beef Association, Washington, DC .....	51
Prepared statement of .....	130
Caldwell, Lynton K., Professor of Public and Environmental Affairs, Indi- ana University, Bloomington, Indiana .....	65
Prepared statement of .....	88
Chu, Dan, Executive Director, Wyoming Wildlife Federation, Cheyenne, Wyoming .....	54
Prepared statement of .....	86
Geringer, Hon. James, Governor of Wyoming, Chairman, Interstate Oil and Gas Compact Commission, Oklahoma City, Oklahoma, and Vice Chairman, Western Governors' Association, Co-chair, Great Plains Partnership .....	7
Prepared statement of .....	105
Hutchinson, Howard, Executive Director, Coalition of Arizona/New Mex- ico Counties for Stable Economic Growth, Glenwood, New Mexico .....	67
Prepared statement of .....	206
Leftwich, Tim J., Senior Environmental Scientist, Principal, GL Environ- mental, Inc., Rio Rancho, New Mexico .....	62
Prepared statement of .....	149
Loesel, Jim, Roanoke, Virginia .....	64
Prepared statement of .....	202
McGinty, Hon. Kathleen, Chair, Council on Environmental Quality, Washington, DC .....	11
Prepared statement of .....	113
Norton, Hon. Gale, Attorney General, State of Colorado, Denver, Colo- rado .....	14
Prepared statement of .....	123
Scarlett, Lynn, Reason Public Policy Institute, Los Angeles, California .....	56
Prepared statement of .....	140
Additional material supplied:	
American Farm Bureau Federation, Washington, DC, prepared statement of .....	102
American Forest & Paper Assoc., prepared statement of .....	264

# IV

	Page
Additional material supplied—Continued	
American Petroleum Institute, the Natural Gas Supply Association, the Independent Petroleum Association of America, the Mid-Continent Oil and Gas Association, the Western States Petroleum Association, and the National Ocean Industries Association, prepared statement of .....	100
Borrone, Lillian C., Director, Port Commerce, The Port Authority of New York & New Jersey .....	92
Browner, Carol M., Administrator, Environmental Protection Agency, Federico F. Peña, Secretary, Dept. of Transportation, Togo D. West, Jr., Secretary, Department of the Army, prepared statement of .....	94
East Texas Wind Storm—Sabine National Forest .....	222
Green River Basin Advisory Committee, NEPA Streamlining Recommendations .....	277
Penelas, Hon. Alex, Mayor, Miami-Dade County, prepared statement of ...	99
Problems and Issues with the National Environment Policy Act of 1969 ...	223
Rocky Mountain Oil & Gas Association, prepared statement of .....	96
The National Environmental Policy Act Impact on Public Lands Mineral Development and Options for Reform .....	164
Zelms, Jeffrey L., President & CEO, Doe Run Resources Corp., prepared statement of .....	269

## HEARING ON PROBLEMS AND ISSUES WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

---

WEDNESDAY, MARCH 18, 1998

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON RESOURCES,  
*Washington, DC.*

The Committee met, pursuant to notice, in room 1324, Longworth House Office Building, at 11 a.m., the Hon. Don Young, Chairman, presiding.

Members present: Representatives Young, Chenoweth, Cannon, Gibbons, Hill, Hinchey, Pallone, Pombo, Thornberry, Cubin, Hansen, Saxton, Vento, Crapo, and John.

Chairman.YOUNG. The Committee will come to order. Today we are gathered to examine problems and issues with the National Environmental Policy Act of 1969.

NEPA is prime for an oversight hearing. It is the product of 1960's thinking, with no legislative or regulatory change to speak of over 20 years. NEPA is experiencing many problems. This White House's neglect, abuse, and avoidance of its NEPA responsibilities are serious issues.

The Council on Environmental Policy was created by NEPA to administer the Act. Ms. McGinty is now the only member of the poorly named council. Just a few weeks ago, Ms. McGinty, you told Congressman Lewis, who is the Chairman of your Appropriations Subcommittee, that NEPA reinvention was your top priority; yet, you have only a tiny fraction, of any, of your staff working on this project.

Specifically, Ray Clark is supposed to be your NEPA man, but he's spending his time now on your controversial American Heritage Rivers program.

When he was in Montana last week, Mr. Clark got quite a feel for the distaste that many of our constituents harbor about that program, which the CEQ is trying to orchestrate. You told Congresswoman Carrie Meek a couple of years ago that the Homestead Air Force District in her Miami District would be free of its NEPA problems under your oversight. This Administration said Homestead was on the fast track to gainful use. Today Homestead lies barren. The local economy is suffering. We have testimony from the Mayor of Miami-Dade County as to these facts.

You told members of the Utah delegation to Congress that this Administration was not moving forward on any plans for the monument designation in Utah. By subpoenaing your e-mail, our staff

has documented that not only did you purposely keep members of the Utah delegation in the dark, but you also worked to designate the monument as an end-run around the National Environmental Policy Act that you're supposed to be administrating.

Now you're working on a moratorium on the roads in national forests. We have seen that you've chosen to circumvent a full NEPA examination of the issues by using an interim rule and you have again thumbed your nose to this Congress and to public comment.

This Administration has demonstrated that it has one set of standards for itself, and another for the common citizen, our constituents.

I'm here to tell you that this Administration is not above the law or this Congress. Again, this Act has not been reviewed, it has neither been looked at nor had any oversight for the last 20-some-odd years. It is time we find out what NEPA is doing, where we're headed, and are we going to make this work for the people of America. Or, is it going to continue to be a process in which some here are heard and some are not heard.

I think it's very unfortunate that we have now seen that much of the public is not heard.

Let us go to the opening statement by Ms. Barbara Cubin at this time and the introduction of her one witness, please.

**STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF WYOMING**

Ms. CUBIN. Mr. Chairman, I will submit my opening statement to the record. I was just looking for it and I don't want to hold the Committee up.

But I am honored to introduce our first witness; that would be Governor Jim Geringer from the great, greatest State of Wyoming. Jim and I have been friends for a long time. We served in the Wyoming State Legislature together, first of all, in the State House and then in the State Senate.

Jim is very knowledgeable about all of the issues that are in front of this Committee and it is a great honor for me to introduce my friend and my Governor, the Honorable Jim Geringer.

[The prepared statement of the Hon. Barbara Cubin follows:]

STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE  
STATE OF WYOMING

Mr. Chairman, thank you for holding this oversight hearing today on the problems and issues associated with the National Environmental Policy Act (NEPA). I'm pleased to see that my friend and colleague, Governor Geringer, is here to testify on behalf of our State and I look forward to his testimony. The Governor will also be appearing before my own Subcommittee tomorrow to discuss royalty-in-kind for OCS and Federal oil and gas leases, so I feel fortunate to have him here for two days to provide us with the benefit of his counsel on these important issues.

Although I believe that NEPA was never intended to mandate particular results, but simply to prescribe the necessary processes to allow Federal agencies to understand the environmental consequences of a particular action, my fear is that we have really moved in the opposite direction. By that I mean that we have so many competing interests involved in a Federal agency action—some with much at stake, others with nothing at stake—that various groups often tend to impose their will upon an agency to make a particular decision, regardless of what the true scientific facts are.

But more often than not, what we see and have seen in Wyoming as Governor Geringer will attest to here today is the lack of cooperation among the State and

Federal agencies. Decisions are routinely made without the State's consent or comments or worse still, State's comments and concerns are ignored. This style of management is simply unacceptable and merely leads to friction in what could and should be a more collaborative process.

In Wyoming for example, in response to a number of concerns and appeals surrounding the impacts of oil and gas development on Federal lands, Secretary Babbitt and Assistant Secretary Armstrong insisted on putting together an advisory council to look at ways in which to streamline the leasing process in the Green River Basin in Wyoming. Although I will be the first to admit that I was fairly skeptical about this committee, I think in the end the group came up with some reasonable recommendations to resolve resource conflicts on public lands. Regrettably, I don't believe many of those recommendations were adopted by the Interior Department, but the committee does demonstrate that consensus can be reached when varying interests are included from the outset in a particular issue.

In stark contrast, however, is the American Heritage Rivers Initiative (AHRI), a product of the President's 1996 State of the Union Address which later became an Executive Order mandate. Notwithstanding the fact that this initiative involved twelve Federal agencies and would have a tremendous impact on our States and rural communities, no Environmental Impact Statement was ever prepared on the AHRI. While I realize the President's Council on Environmental Quality (CEQ) has some leeway in excluding certain Federal initiatives from the NEPA process, I am still puzzled as to how or why that could be the case with AHRI. I intend to quiz Ms. McGinty on that very issue when my turn for questioning comes around.

Mr. Chairman, there is no doubt in my mind that NEPA was a well-intentioned law aimed at providing Federal agencies with the necessary tools to make decisions about how resource development projects might affect our environment and examine ways in which to mitigate those impacts. But I also think of it as a law of unintended consequences. I hear numerous complaints from my constituents on a regular basis complaining of the unnecessary delays associated with Environmental Assessments and EIS's, not to mention the costs incurred with the work product. So I hope if nothing else, we can come away from this hearing with some solid ideas on how to improve the NEPA process. With a little help and consistency from both State and Federal agencies across the country, we can not only improve the contents of NEPA documentation, but we can reduce the time frame allotted to them and, accordingly, the size of the text and review time necessary for local authorities. I look forward to working with the members of the Committee on that important effort.

Chairman YOUNG. I thank the kind lady. Are there any other opening statements at this time, before I call the rest of the witnesses? Ms. Chenoweth?

Ms. CHENOWETH. Mr. Chairman, I have an opening statement.

Chairman YOUNG. Yes, ma'am. You are recognized.

**STATEMENT OF HON. HELEN CHENOWETH, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO**

Ms. CHENOWETH. Mr. Chairman, I want to thank you for holding this oversight hearing on the implementation, application and successes of the National Environmental Policy Act.

Mr. Chairman, from my vantage point, the application and implementation of NEPA by the Clinton-Gore Administration has not been based on science, as the Act requires, but on pure politics. Take, for instance, a recent blow-down in the Sabine National Forest in eastern Texas and this—I will send this up for your perusal, Mr. Chairman.

---

Sabine photograph on page 222

Roughly 102,000 acres of trees were blown down, broken and lying on the forest floor. This is indeed a catastrophic event and the waivers provided by CEQ were correct and needed. These waivers allow logging companies to go in and harvest the dead trees,

clean the forest floor, protect the area from wildfire, and, thus, save the Sabine National Forest's health.

I would like to publicly congratulate Ms. McGinty and Vice President Al Gore, who became personally involved in the salvage operation in east Texas, which just happens to be in the district of our Democratic colleague, Jim Tanner.

I thank them for moving quickly in Texas by waiving NEPA to achieve forest health objectives. Contrast this with what is happening in Idaho. In northern Idaho, the Idaho Panhandle National Forest, we suffered ice storm damages on thousands of acres, and I fail to see why the Administration can do the right thing in Texas, but fails to do so in Idaho, Washington, Montana, California, Wyoming, Utah, New Mexico and Colorado.

Unfortunately, this appears to be a pattern. Just two weeks ago we held a hearing on the application of the Endangered Species Act and the hearing and numbers only confirmed what most of us already believed. More than half of the budgets of both the National Marine Fisheries Service and the Fish and Wildlife Service go to the west and, in the case of National Marine Fisheries Service, more than 70 percent of its enforcement budget goes to the northwest.

Most of the Federal Endangered Species listings and jeopardy findings are in the west, this in spite of the fact that the eastern states have listed more than a thousand species, listing the Federal agencies have fully ignored. And to make matters worse, NMFS applies different criteria to the Atlantic Salmon and the Pacific Salmon.

The latest attack, the Clinton-Gore roadless moratorium is a wholesale sidestep of NEPA and the Administrative Procedures Act. Even though the proposal threatens the health of the forest, the economic well-being of communities, the livelihoods of families, the Forest Service is planning open houses.

I ask, Mr. Chairman, on this major Federal action, where is the opportunity for the public comment and input? There are no hearings, as required for significant Federal actions; only opportunities for the agencies to engage in propaganda. This is terrible.

Why is this, Mr. Chairman? From my vantage point, it's pure politics.

Again, I want to thank you for holding this hearing and I look forward to questioning our witnesses.

[The prepared statement of the Hon. Helen Chenoweth follows:]

STATEMENT OF HON. HELEN CHENOWETH, A REPRESENTATIVE IN CONGRESS FROM  
THE STATE OF IDAHO

Mr. Chairman, thank you for holding this oversight hearing on the implementation, application and successes of the National Environmental Policy Act, otherwise known as NEPA. This is an incredibly important issue to my state.

Mr. Chairman, from my vantage point, the application and implementation of NEPA by the Clinton-Gore Administration has not been based on science as the Act requires; but on politics. Take for instance a recent blowdown in the Sabine National Forest in Eastern Texas.

Roughly 102,000 acres of trees were broken and lying on the forest floor. This is indeed a catastrophic event, and the waivers provided by the Council on Environmental Quality (CEQ) were correct and needed. These waivers allow logging companies to go in and harvest the dead trees, clean the forest floor, protect the area from wild fire, and thus save the Sabine National Forest's health.



I would like to publicly congratulate Katie McGinty and Vice President Al Gore who became personally involved in the salvage operation in East Texas, which just happens to be in the district of our Democratic colleague Jim Tanner. I thank them for moving quickly in Texas, by waiving NEPA, to achieve forest health objectives.

Contrast this with what has happened in Idaho. In northern Idaho's Panhandle National Forest, we suffered ice storm damages on thousands of acres. I fail to see why the Administration can do the right thing in Texas, but fails to do so in Idaho, Washington, Montana, California, Wyoming, Utah, New Mexico and Colorado.

Unfortunately, this appears to be a pattern. Just two weeks ago, we held a hearing on the application of the Endangered Species Act. The hearing and numbers only confirmed what most of us already believed. More than half of the budgets of both the National Marine and Fisheries Service and the Fish and Wildlife Service go to the West; and in the case of NMFS, more than 70 percent of its enforcement budget goes to the Northwest Region. Most of the Federal endangered species listings and jeopardy findings are in the west; this in spite of the fact that the Eastern States' have listed more than a thousand species ... listings the Federal agencies have fully ignored. To make matters worse, NMFS applies different criteria to the Atlantic Salmon and the Pacific Salmon.

The latest attack, the Clinton-Gore Roadless Moratorium, is a wholesale sidestep of NEPA and the Administrative Procedures Act. Even though the proposal threatens the health of the forests, the economic well-being of communities, the livelihoods of families, the Forest Service is planning Open Houses!!! I ask, Mr. Chairman, on this major Federal action, where is the opportunity for public comment and input? There are no hearings as required for significant Federal actions, only opportunities for the agency to engage in propaganda. This is horrible.

Why is this, Mr. Chairman? From my vantage point, it's politics!

I look forward to questioning our witnesses.

Chairman YOUNG. Mr. Pallone.

**STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

Mr. PALLONE. Thank you, Mr. Chairman. I just wanted to say that NEPA is, in many ways, the most important of all environmental legislation. It was the first and still key environmental statute that sprang up in the early 1970's, when Americans demanded action to address environmental quality in context of the first Earth Day.

And unlike other environmental statutes, the target is specific aspects of environmental protection, like the Clean Water Act. NEPA is fundamental to overall environmental problems. It requires the Federal Government to consider the environmental impacts of its actions and, even more importantly, NEPA often provides the only opportunity for public comment on these Federal proposals.

If nothing else can speak to the effectiveness of NEPA, then it is the number of attempts to waive NEPA in the 104th and 105th Congresses.

But I have to say that the possibility—possibly the most effective aspect of NEPA, in my opinion, is the Council of Environmental Quality, which is actually formed under the statute. I simply cannot say enough good things about the CEQ. And I'm not just saying it because Katie McGinty is here today to testify.

I want to just give an example, very briefly. CEQ was instrumental in the New York/New Jersey area in eliminating the gridlock on a very controversial issue in our area, and that was the dredging and disposal of dredged material. For years, maintenance dredging from the Port of New York and New Jersey was being held up because there was no place to put contaminated dredged spoils.

Traditional practice was to simply dump it in the ocean, just off my district, as luck would have it, and my constituents and I fought hard against the ocean dumping of these toxic sediments in what was essentially our back yard at the Jersey shore.

But just as vocal on the other side of the issue were the port interests, both industry and labor, and in the middle were the Army Corps of Engineers and the EPA, which regulated and administered dredging and dredge disposal permits. The battle between these parties raged on for years, to the point where just a couple of years ago, New York City ended up paying millions of dollars to ship dredged materials to Utah and, for some reason, we could not come to a resolution, and that was until CEQ got involved.

CEQ brought everyone to the table; the environmental interests, the port interests, the labor interests, the EPA, and the Corps, and, with CEQ's help, we finally reached an agreement. With their help, we finally closed the last ocean dumping site off the Jersey shore last fall, while, at the same time, moving priority dredging projects for the Port of New York. And now disposal alternatives are being developed that actually involve the beneficial reuse of this material for construction purposes, the same material that just a few months ago you couldn't pay to get rid of unless you were willing to send it almost clear across the country.

CEQ was instrumental in this endeavor and I know that without their help, we never could have accomplished what I consider to be a landmark achievement for the Jersey shore and the Port of New York and New Jersey.

I just have a letter from the Port of New York and New Jersey which expresses its support and the great work that the CEQ is doing. I would like to submit it for the record, with your permission, Mr. Chairman.

In closing, I just wanted to thank Katie McGinty for all the great work that I think the CEQ is doing.

I think this is an important example because on the one hand, we had the labor and business interests; on the other, we had the environmental interests, and she and the Council were able to work this out to everyone's satisfaction, so that everyone is, in effect, happy today, and we're also not shipping this stuff to Utah, which I think, I'm sure the people in Utah appreciate, as well.

Thank you, Mr. Chairman.

[The prepared statement of Representative Pallone follows:]

STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM  
THE STATE OF NEW JERSEY

Thank you, Mr. Chairman.

Mr. Chairman, the National Environmental Policy Act, informally referred to as NEPA, is really in many ways the most important of all environmental legislation. It was the first of and still key environmental statute that sprang up in the early 1970's when Americans demanded action to address environmental quality in the context of the first Earth Day.

Unlike other environmental statutes that target a specific aspect of environmental protection like the Clean Water Act, NEPA is fundamental to overall environmental protection. NEPA requires the Federal Government to consider the environmental impacts of its actions. And even more importantly, NEPA often provides the only opportunity for public comment on these Federal proposals.

If nothing else can speak to the effectiveness of NEPA, then it is the number of attempts to waive NEPA in the 104th and 105th Congresses.

But I would have to say that possibly the most effective aspect of NEPA is the Council of Environmental Quality, which is actually formed under the statute.

I simply cannot say enough good things about CEQ—and I'm not just saying that because Katie McGinty is here to testify before us today.

CEQ has been instrumental in the New York–New Jersey area in eliminating the gridlock on a very controversial issue in our area—dredging and dredged material disposal. For years, maintenance dredging for the Port of New York and New Jersey was being held up because there was no place to put the contaminated dredged spoils. Traditional practice was to simply dump these contaminated spoils in the ocean, just off of my district—as luck would have it. My constituents and I fought hard against the ocean dumping of these toxic sediments in what was essentially our backyard at the Jersey Shore. But just as vocal on the other side of the issue were the port interests, both industry and labor. And in the middle were the Army Corps of Engineers and the U.S. Environmental Protection Agency which regulate and administer dredging and dredged material disposal permits.

The battle raged on for years, to the point where just a couple of years ago, New York City ended up paying millions of dollars to ship dredged material to Utah. For some reason, we could not come to a resolution. Until CEQ got involved.

CEQ brought everyone to the table—the environmental interests, the port interests, the labor interests, the EPA, and the Corps—and with CEQ's help, we finally reached agreement. With CEQ's help, we finally closed the last ocean dump site off of the Jersey Shore last fall while at the same time moving priority dredging projects for the Port. And now, disposal alternatives are being developed that actually involve the beneficial re-use of this material for construction purposes, the same material that just a few months ago, you couldn't pay to get rid of unless you were willing to send it almost clear across the country.

CEQ has been instrumental in this endeavor and I know that without their help, we never could have accomplished what I consider to be a landmark achievement for both the Jersey Shore and the Port of New York and New Jersey.

At this time, I would like to ask that a letter from the Port Authority of New York and New Jersey which expresses its support for CEQ and the great work that they are doing be submitted into the record.

In closing, I want to thank Katie McGinty for all of the great work that I think CEQ is doing. I look forward to continuing to work with her and her staff at CEQ on environmental issues that are important to both New Jersey and the Nation as a whole.

Thank you.

Chairman YOUNG. Any other opening statements?

[No response.]

Chairman YOUNG. If not, I will call the rest of the panel to the floor. Ms. McGinty and the Honorable Gale Norton, Attorney General of the State of Colorado. Please take your seats.

Again, I want to restate, this is the first oversight hearing we have had on NEPA since the creation of it. We are here to find out where we're headed, not where we've been, and if there is a—I would call it a discretionary ability for the Council on Environmental Quality to pick certain areas to do things and certain areas not to do things for political purposes.

If that is the case, then the Act itself is failing. Governor, you are welcome to the Committee and, again, with the kind introduction your great Congresslady made, I will not introduce you any further. But welcome and we look forward to your testimony as the Governor of one of the states nearly as pretty as Alaska; not quite, but nearly. Governor, you're up.

**STATEMENT OF HON. JAMES GERINGER, GOVERNOR OF WYOMING, CHAIRMAN, INTERSTATE OIL AND GAS COMPACT COMMISSION, OKLAHOMA CITY, OKLAHOMA; VICE CHAIRMAN OF THE WESTERN GOVERNORS' ASSOCIATION**

Mr. GERINGER. Well, it's a matter of judgment, Mr. Chairman. Since you're the Chairman, it's your state.

Chairman YOUNG. Thank you, sir.

Mr. GERINGER. Thank you for the opportunity to be with you today and the Committee on Resources Oversight as we discuss the National Environmental Policy Act.

I'm the Governor of Wyoming, though one of the organizations that I am chair of has its headquarters in Oklahoma, and that's the Interstate Oil and Gas Compact Commission.

That is an organization of 36 member states and four international affiliates who are involved with the regulation and conservation of our energy resources.

But I am here principally as the Governor of Wyoming, to represent its people, and also to speak for a couple of other organizations. I am currently the Vice Chairman of the Western Governors Association. Tony Knowles, Governor of Alaska, is chair, and we will be up in your territory next summer, Mr. Chairman.

Also, I am here with the Great Plains Partnership, which I co-chair, along with John Sawhill of the Nature Conservancy. The reason I cite these organizations and their interest is that all of them are working to improve the process of involving people, our lands, our livelihood and our future in resource management.

This is a people issue, Mr. Chairman, and I hope that we can focus on that, instead of that blasted buzzer.

Mrs. CHENOWETH. We want to make sure you're awake.

Mr. GERINGER. I see that. The National Environmental Policy Act was enacted in 1969, with the stated purpose of understanding the interrelations of all components of the natural environment, taking words from the purpose clause. It goes on to say that it's the policy of the Federal Government, in cooperation with state and local governments and other concerned public and private organizations, to create and maintain conditions under which we can exist to fulfill social, economic and other requirements of the present and future generations.

I call your attention to those words, Mr. Chairman, because the impact and the intent have been diminished considerably over the years. I was reviewing some of the documents put out by the Council on Environmental Quality. Kathleen McGinty, seated with me here today, has said we have much to gain in finding common ground to conserve resources for future generations, while at the same time we provide a stable economic future our people.

I call attention to those words, as well, because the economic considerations are not always a major factor as we evaluate NEPA and the other environmental Acts.

Katie McGinty made a statement from the chair in the CEQ 25th anniversary report that says "Our common ground, the environment, has become a battleground. Somehow we have become a country in receivership, with the courts managing our forests, our rivers and our range lands."

In fact, Mr. Chairman, it's not just that the courts are directly involved in managing many of our resources, they are indirectly managing all of them in our states because of the fear of litigation, not just because of actual litigation.

The Act called NEPA is not the problem so much as the implementation of the Act. It takes too long, it costs too much, it's spawns unending litigation, and it is so inconsistently implemented

that each agency of the Federal Government has its own custom-tailoring of an approach.

You'd likely not even have to amend NEPA at all, Mr. Chairman, if we could simply require the Federal Government to be consistent and speak with one voice. We have one President, one Congress. We ought to have just one Federal Government when it comes to speaking on issues.

We have to change the confusing and contradictory regulations used by the Federal agencies to implement NEPA. In other words, it's not the Act, it's the actors.

The Act is intended to require Federal, state and private actions that are comprehensive, with better planning, that have an inter-generational view in their effect and strike a wholesome balance between the environment and the economy. Quoting from the Act itself, 1022(a), which discusses the fact that we are looking at the impact on the human environment, the human environment is cited several times in the regulations of the CEQ and the economy has to be a factor in that overall human environment; after all, poverty and loss of community are definitely part of the human environment.

I have several suggestions for improving NEPA, but the importance of a stronger role for state and local governments is what I would emphasize the most today.

In a letter that Katie wrote to me last summer, it says that "Regulations implementing the Act at CFR 1508.5 are clear that a state or local government may, by agreement, with the lead agency, become a cooperating agency." Quoting further, "Frankly, considering NEPA's mandate and the authority granted in Federal regulation to allow state and local cooperation through agreement, cooperator status for state and local governments should occur routinely." In fact, it does not.

In fact, I would cite two other sections of the CEQ regulations that allow for the appointment of joint lead agencies with the states as a joint lead agency and also a reference in 1506.2(c) that says "State and local governments shall be designated as joint lead agencies in those appropriate areas."

In fact, that does not occur at all, let alone routinely. Clearly, the shortcomings with NEPA are in the application, not in the purpose. Agencies have much too much of their focus on producing litigation-proof documents and not enough concern about involving people in the process.

I recommend improvement in five key areas. First, involve the right people, which means including local and state governments from the beginning. Quite often, Federal agency officials come to my Wyoming office to update me on actions they've already taken or will take. Well, Mr. Chairman, I'm tired of being updated. The states are partners in natural resource management and rather than being updated, we should be included in the planning and the evaluation process to ensure that our people are represented in the spirit in which NEPA was enacted.

I remind those here today that the states were not created by the Federal Government; rather, the Federal Government was created by the states. We have governing responsibilities under law that

cannot and should not be set aside. Clearly, we have shared and concurrent jurisdiction with the Federal agency managers.

As an example, when the U.S. Forest Service and the Bureau of Land Management oversee the land management responsibilities they have, the states have primacy over wildlife management, air quality, water quality, solid waste disposal, and water rights management on those very same lands. In other words, we have a joint or shared responsibility that requires full partnership, not just a close relationship.

Let me repeat that. We want a full partnership, not a close relationship. By analogy, the police officer with a prisoner in handcuffs has a close relationship with the prisoner, but I would hardly call that a partnership.

Mutual respect and benefit characterize a partnership. Take the handcuffs off, Mr. Chairman.

The Great Plains Partnership, which represents 14 Great Plains states, has a mission statement that, paraphrased, goes like this—“We need to help the people on the land feel good about stewardship in control of their choices so that they can pass something along to their children that’s better than what they receive.”

We have to show in plain and simple actions that the environment, the economy, and the community are compatible. Our citizens are tired of the judicial gridlock and they’re feeling left out of the process. They are willing and able to participate. Local government involvement, particularly early in the process, can greatly reduce conflicts in litigation, which is an extraordinary cost to our government.

That first recommendation then focuses on the need to be partners with state and local governments.

My second recommendation is that coordination among and within agencies has to be improved. We have duplication of environmental analyses, to the detriment of the process and the expense of the Federal Government. We could redirect many of our financial resources if they were only better utilized.

The poor coordination among the project proponents, lead agencies, and third parties that are hired to conduct the analysis does not always occur.

Third, inconsistencies among and within agencies have to be reduced. We have Forest Service management on permit allotments in Wyoming, where one forest requires only the grazing allotment-holder to do the oversight, the second forest requires the officials only in the Forest Service to do the monitoring, and the third forest allows the policy to change from district to district. Again, the Federal agencies should speak with one voice.

Two more points, Mr. Chairman, and I’ll wrap it up. Fourth, the training of Federal agency personnel needs to be improved and increased. The word is not getting even from the CEQ regulations down to the field. Even the CEQ regulations very clearly cover the economic and community impact and the participation of the states; yet, it’s not at all implemented at the local level. There has to be a recognition of that legitimate role for state and local government.

Even understanding the difference between EAs and EIS’s is not even clear down at the local level. There need to be consistency and

reasonable alternatives, clear, concise documents that use plain language and limits on the volume of the paperwork.

In the words of the CEQ regulation, the goal is to be analytic, not encyclopedic.

Fifth and finally, there must be a scientific, substantive basis for asking for how to manage so that we avoid the endless inquiries and unnecessary data collection. I call your attention to the use of adaptive management, which the National Academy of Sciences calls the process where management and research are combined so that the projects are specifically designed to reveal causal relationships between interventions and outcomes to maximize learning.

Regulations should be built upon adaptive management and trust. Make a decision based upon the best information at that time, don't try to cover every possible contingency. You can always ask one more question that starts off with "what if." Make the decision, get underway and monitor the performance and if there is impact, adapt to correct the problem. Use accurate science and modern technology and train the people to be objective.

The culture and the history of the Rocky Mountains reflects a strong spirit of independence and innovation. We have a deep-seated respect for each other and a spirit of cooperation, where it's not just a matter of neighborliness that can mean survival. We do support each other; we respect the resource; we conserve for the next generation to prevent the irreversible deterioration that comes from a lack of stewardship.

It is in this spirit that I present my comments today, with the goal of improving the implementation of NEPA.

Chairman YOUNG. Governor, we're about out of time. I apologize.

Mr. GERINGER. Mr. Chairman, I will answer any questions.

[The prepared statement of the Honorable Jim Geringer may be found at end of hearing.]

Chairman YOUNG. I do thank you for your testimony. This Committee will recess until 20 minutes of 12. I want all of you back here, if we're going to ask the questions. I do thank you. The Committee is now recessed for 10 minutes. Thank you.

[Recess.]

Chairman YOUNG. The Committee will come back to order. I do thank the panel for bearing with this very ineffective system we call Congress, running back and forth, but apparently we are now through with our votes for a length of time, so we can go through the panel.

The next testimony, we will hear from Kathleen McGinty, Chair of the Council on Environmental Quality, Washington, DC. You're up.

#### **STATEMENT OF HON. KATHLEEN MCGINTY, CHAIR, COUNCIL ON ENVIRONMENTAL QUALITY, WASHINGTON, DC**

Ms. MCGINTY. Thank you, Mr. Chairman and members of the Committee. Thank you for the opportunity to visit with you today on the National Environmental Policy Act. This Committee certainly is to be congratulated; first, in the historic role the Committee played in devising and putting into place the National Environmental Policy Act and, also, now today, in spending time and effort to oversee and ensure the Act's faithful implementation.

Let me state that I believe very strongly that NEPA is a seminal statute and I say that not just as an environmental statute, but more broadly. For four reasons, I think that that is the case.

First and foremost, NEPA is not just about the environment. While it certainly has been a watershed statute in ushering in our efforts to protect the environment in this country, NEPA actually is about the integration of environmental, economic and social considerations into one coherent whole.

Second and related to that very important piece of what NEPA is about is that NEPA is the singular place where we see both a directive and, through the Council on Environmental Quality, the opportunity for there to be cooperation and coordination among the various parts of the Federal family.

Third, NEPA is that statute that calls for, if you will, sobriety in the expenditure of the public's fisc. It asks and calls on the agencies to look before they leap, to plan and make decisions in a sound and wise way, and, fourth, very related to all of the above, NEPA is a seminal statute because it is that one place that ensures a democratization of decisionmaking. It is that one instrument through which the public and state and local governments have a seat at the table as decisions are made which affect them in a very real way.

I think, Mr. Chairman, certainly in the last 5 years, but in the 30 years of NEPA's history, we have been able to accomplish enormous successes through NEPA. First, we have been able to change conflict into cooperation. Mr. Pallone cited the example in the New York/New Jersey harbor. Years of battling, yielded to a cooperative and collaborative approach that serves both the environment and the economic interests in the New York/New Jersey region.

In California, a similar situation with regard to the management of water resources, 20 years of feuding, ceding to cooperation and collaboration as environmental-economic interests brought together for the first time into a collaborative process.

And just last week, a joint initiative we were able to undertake with the Governor of California to finally move beyond the loggerheads we have seen under the Endangered Species Act and reach a partnership agreement with the State of California which avoids Federal action to list salmon in northern California.

All of these things enabled by that piece of NEPA that says we should move from conflict to cooperation and collaboration by bringing all the interests to the table.

Second, NEPA has been the instrument through which we have saved the public a vast amount of money. In South Carolina, \$53 million saved as a bridge was redesigned, money saved and wetlands protected that otherwise would have been lost through a more expensive approach.

In Texas, up to \$54 million saved as NEPA analysis showed that new ports and new docking facilities were not necessary. The list can go on and on.

Third, NEPA has enabled us to engage the public as never before in decisions that affect their lives. Governor Geringer has been a leader in this regard and I was pleased to work with him to ensure that for the first time the State of Wyoming and Park County, Wy-



oming will be cooperating agencies in figuring out the best management plan for Yellowstone.

Overall, NEPA has been about telling us that the choice between jobs and the environment is a false choice. Either we will have both or we will have neither, and NEPA further tells us that the only way we will avoid that false polarization we have seen is if we integrate environmental, economic and social considerations and we achieve that integration by bringing the variety of voices and actors to the table for collaborative processes.

Despite these successes, Mr. Chairman, and members of the Committee, there have been shortcomings. To echo what the Governor has said, those shortcomings are inherent not in the statute itself or the regulations that CEQ has issued to implement the statute over the years, but in the implementation of the statute itself.

The shortcomings fall into several categories. Paperwork; NEPA is supposed to be about good decisions, not grand documents. But instead we have seen a proliferation of paper rather than a perfection of process which truly vests the public with the interests that they deserve in decisions that affect their lives.

Second, minutia; NEPA has gotten involved in the small actions that happen every day, but has been lost in the larger policy-making, programmatic planning and processes that the agencies follow.

Third, pro forma procedures; rather than giving the public an opportunity to feel effectively engaged in decisionmaking, the public often feels that the public hearings that are provided are pro forma, that we are going through the motions, but that, in fact and in reality, the decision has already been made.

Fourth, continued confrontation and lack of collaboration. This comes back to a technical part of the statute. The agencies are not fully taking advantage of implementing the scoping process that NEPA provides. That process is about getting all of the interests to the table up front, identifying any problem that's going to arise with the project up front, and work it out as the project moves itself along in the process.

In light of these shortcomings, Mr. Chairman, as you mentioned, it has been my priority to reinvent the processes that have evolved in the implementation of NEPA and to secure again the original purposes of NEPA.

We have made progress in that regard. We have issued a plain English directive to make these documents understandable to the general public. We have begun to enforce page limitations on how long the documents can be and we have begun to insist that the agencies use common terminology; so that the Forest Service is speaking the same language as the BLM, for example.

We had a project plan to move forward and build on these initial steps that we're taking. A project that would include the adaptive management procedures that the Governor refers to, landscaped scale management, moving up to programmatic levels of NEPA implementation, and, importantly, further ensuring the participation of state and local governments.

As this Committee is well aware, the Congress did not support the reinvention initiative last year, however, and I welcome this

forum as an opportunity further to reflect on the importance of that reinvention effort and hopefully to secure with you a path for moving forward with that reinvention effort once again.

Thank you very much, Mr. Chairman and members of the Committee.

[The prepared statement of Kathleen McGinty may be found at end of hearing.]

Chairman YOUNG. Thank you, Ms. McGinty. Ms. Norton, you're up next.

**STATEMENT OF HON. GALE NORTON, ATTORNEY GENERAL,  
STATE OF COLORADO, DENVER, COLORADO**

Ms. NORTON. Mr. Chairman and members of the Committee, I appreciate this opportunity to discuss the National Environmental Policy Act with you today.

I think NEPA is a good piece of legislation that has lost its way during implementation. With some small changes, however, it can accomplish what it was intended to accomplish; that is, having the state and Federal Governments work together to find and implement the proper balance between protecting the environment and achieving other societal goals.

I will focus today on the federalism issues of NEPA. I am familiar with both the Federal and state perspectives on environmental and natural resources issues. During my 7 years as Colorado's Attorney General, I have been personally involved in many environmental and natural resources issues, and I was selected by other Attorneys General to chair our Environment Committee.

During the Reagan Administration, I served in the Department of Interior as Associate Solicitor for Conservation and Wildlife. In addition, I am currently the national chair of a new organization, the Coalition of Republican Environmental Advocates.

The National Environmental Policy Act was passed by Congress in 1969 and signed into law by President Richard Nixon in 1970. The Act reflected a widespread public desire to address concerns over the worsening state of the environment.

Today, environmental impact statements and environmental assessments are a routine part of the planning for any project undertaken by the Federal Government or that requires Federal approval. The EPA Office of Federal Activities recently described the statistical picture of NEPA analysis. Of the final EIS's submitted in 1996, the longest had 1,638 pages of text, while the average was 572 pages, including 204 pages of NEPA analysis. Although an average of only 508 environmental impact statements were prepared each year between 1990 and 1995, CEQ estimated that about 50,000 environmental assessments were being prepared annually.

The original goal of NEPA and many other environmental statutes was to forge a Federal/state partnership in protecting the environment. In NEPA, state and local governments were to have an essential part in determining the environmental and societal impacts of Federal actions.

This state/Federal partnership has worked well in some instances. For example, the U.S. Department of Transportation has allowed our Colorado Department of Transportation to play a significant or even primary role in preparation of some EIS's. On the

other hand, states have often found themselves at odds with the Federal Government when the issue involves public land, an issue that is critically important to western states.

This is not what Congress intended when it began the environmental decade. To remedy this problem, Senator Thomas recently introduced Senate Bill 1176, the State and Local Government Participation Act, which would amend NEPA to specifically require Federal agencies to cooperate with states and counties.

Innovative environmental policies come about when the states can act as laboratories of democracy. Furthermore, the states are important in the Federal/state environmental partnership because there is no such thing as one-size-fits-all government. The states, where government is closer to the people, are the proper entities to implement environmental laws and policies.

To return to the original intent of Congress and NEPA and so many other environmental statutes, I recommend that Congress start the devolution of authority in the environmental area back to the states by a small amendment to NEPA. Specifically, Congress should require that agencies consult at an early stage with state and local governments in developing environmental impact statements.

It should be clear in NEPA that an environmental impact statement is not adequate if it does not fully address state and local concerns.

The most significant challenge set out in NEPA is that government must strive to find a proper balance between environmental protection and other societal needs. We certainly need a clean and healthy environment. Americans applaud the advancements in clean air and clean water made since NEPA and other key environmental statutes went into effect.

We also need a productive society that fulfills the social and economic needs of present and future generations. State, local and Federal Governments must attempt to balance all of these needs in implementing environmental policies. We must ensure that all societal needs and impacts are identified in the NEPA information-gathering process.

If the Forest Service is going to deny an easement for an existing water project, we need to understand not only the environmental impacts, but also the impacts on the way of life of local communities and their economic productivity.

We must use the information collected and analysis done in the NEPA process to identify potential conflicts and initiate a process to resolve them. For example, the NEPA process may identify a potential conflict between the local community and a Federal agency proposing a project. Amendments to NEPA might require that some conflict resolution mechanism be initiated at that point to resolve the conflict.

In short, collecting information and analyzing societal impacts is desirable, but only if the information is used to make well reasoned and balanced decisions about Federal actions.

In conclusion, I would suggest that the policy set out in NEPA 30 years ago is a good one—protect the environment while balancing that protection with other societal needs and goals. Thirty years later, we have sometimes strayed from that policy. The best

thing we can do for citizens and the environment is to return to that original vision.

Thank you.

[The prepared statement of Gale Norton may be found at end of hearing.]

Chairman YOUNG. Thank you, Ms. Norton, excellent testimony. All good testimony by the witnesses.

Governor and Ms. Norton, if I heard you correctly, you're saying that NEPA, to make it really work, should be primarily in the states' authority or in a total partnership with the Federal Government. Is that correct?

Mr. GERINGER. Mr. Chairman, yes. In fact, what should routinely be occurring is so rare that it doesn't even implement the requirements of the Act or the regulations that were designed to do that.

I made reference to joint lead agencies. I don't know if we can cite a situation of recent memory where a state—and I believe the Act itself calls for those areas of responsibility that are statewide—where the state has statewide jurisdiction or an agency within the state has statewide jurisdiction. Those agencies are to be routinely designated as joint lead agencies, not just cooperator status.

We fight hard just to even get cooperator status and usually we are just updated.

Chairman YOUNG. Ms. Norton, are you saying there should be some amendments to the Act itself to make sure this occurs? Right now, it's my interpretation that the agencies, and not necessarily Ms. McGinty herself personally, have in the past cooperated very little and are now cooperating very little. The cooperation usually is with the Federal Government. You either cooperate with the Federal Government or there is no cooperation.

So there has to be an amendment to the Act. Is that my interpretation of your testimony?

Ms. NORTON. The Act itself, as it currently stands, would fully allow cooperation between the states and Federal Government.

The CHAIRMAN. But it isn't required.

Ms. NORTON. It is not.

The CHAIRMAN. It will allow it, but there is no law that says it has to occur.

Ms. NORTON. We would like to see more of a mandate to require—

Chairman YOUNG. I go back to the Governor's comment. Remember, this is supposed to be the United States of America, not the United States of the Federal agencies. I think that is very, very true.

That's one reason I challenge every witness I have before me, anybody, go down the halls or the walks of any street in any town of the United States today and ask them what they think of their Federal Government, and you will be terribly disappointed, and I'm part of it.

So there's something wrong somewhere along the line. The states should be the ones to be lead agencies, and it ends up being the Federal Government saying, "Don't bother us, we're God and don't mess with us."

Katie, I've got a question to ask you. One of the things that concerns me is the reinvention, you talk about reinvention, which is

Al Gore's campaign word. Top priority, but how many people do you have working on reinvention of NEPA right now?

Ms. MCGINTY. Well, every one of my staff engages in a reinvention of the statute in every action they undertake every day. Every example that was either cited by myself or Congressman Pallone, that is CEQ acting, one, to ensure coordination among the agencies; two, to integrate economic and social considerations into environmental decisionmaking.

Chairman YOUNG. With all due respect, Katie, that's not reinvention. That's what you should be doing anyway. What are we doing to expedite the process? We're going to have a chart up here a little later.

The length of NEPA, the requirement for a permit is deplorable. I mean, it takes forever. So what are you doing to reinvent this process?

Ms. MCGINTY. Mr. Chairman, there is no convincing necessary in terms of selling me on how important reinvention is. That's why I launched it and I initiated the overall reinvention project. As this Committee is aware, however, the Congress did not provide resources for the reinvention project last year.

And I would remind the Committee that CEQ, as we exist today, we are less than half the size that we were at the final days of the Bush Administration or as we were proposed to be in the final days of the Bush Administration.

Chairman YOUNG. May I ask the question? Why do you have to increase in size if the states are the lead agencies?

Ms. MCGINTY. Because the job to be undertaken here is enormous. To ensure that—as Gale Norton pointed out, there are 50,000 EAs, approximately, that might be undertaken every year. To really try to make sure that overall on a programmatic basis that the agencies are acting in a way that fulfills the objectives that have been talked about here, giving agencies a seat at the table, integrating various considerations, that can't be done on a—

Chairman YOUNG. You and I have a difference of opinion. I don't think the agencies ought to be doing what they're doing right now. It should be the state that's doing it. The agencies shouldn't have the power they have over an individual when it comes to filing an environmental impact statement.

I never understood why the states can't, in fact, do an environmental job equally or better than the Federal Government. Why should the Federal Government be involved with it anyway?

One question I have last and then my time is running out. Are there any limits on how much a Federal agency can extract from a private citizen to pay for the cost of doing an environmental impact statement?

Ms. MCGINTY. The private citizens do contribute to the analysis that is done on an EIS or an EA.

Chairman YOUNG. In Alaska, the Forest Service is holding a native corporation hostage and requiring them to pay all costs of NEPA to get a right-of-way that's legally theirs across the lands, and every time they finish it, they add to the cost for requiring further studies.

Now, where is the limit here?

Ms. MCGINTY. Well, one of the things that I would like to pursue in the reinvention project is to give a permittee the ability to secure an agreement with the agency on what the time-frame would be, to negotiate a schedule for how long the NEPA process will be. That is one of our top priorities in pursuing the NEPA reinvention project.

Chairman YOUNG. I just think eventually we're going to have to write it into law because this is going on too long—there have been four EIS statements finalized, just about to the point where they can sign off, and they add to it and they're paying for it, in what is an attempt by an agency, using the EIS statement and, in fact, NEPA, to stop the project itself.

I think that is very inappropriate and never was the intent of the Act.

My time has run out and we'll have a second round. Mr. Vento.

Mr. VENTO. Thanks, Mr. Chairman. I'm sorry I can't stay for the hearing, but I think it's an important hearing in terms of exploration of the NEPA law and the role of the CEQ and the chair person, who, I guess, is alone in fulfilling that role these days by virtue of Congress' help.

I want to place in the record the Western Governors Resolution, Mr. Chairman. That hasn't been done yet and I assume that you want it in the record.

Chairman YOUNG. Do you have any objections, Governor?

Mr. GERINGER. None at all.

Chairman YOUNG. All right. We'll do that.

[The information to be inserted may be found at end of hearing.]

Mr. VENTO. Governor, I think that you point out in your statement that the NEPA process has improved Federal decision-making, in the opening paragraph of that particular statement, don't you? This statement says that.

Mr. GERINGER. It depends on which part you interpret.

Mr. VENTO. Well, I'm reading the initial background statement, part one, that it's improved decisionmaking.

Mr. GERINGER. And where that has been properly applied, that is certainly true, because we have a great improvement over what some of our circumstances were in the past on the impact on the environment.

What we're frustrated with now is the endless litigation and the process has turned on itself.

Mr. VENTO. I understand what your concerns are. I mean, one of the statements I read there is in the background, it is .2, it says that it sounds as though you want to consolidate some of the decisionmaking power in NEPA and take it away from Federal agencies.

Is that a valid interpretation of this statement?

Mr. GERINGER. It's to allocate what is rightfully the responsibility of the states and that's why I made the point about concurrent jurisdiction.

Mr. VENTO. Well, of course, I think the issue here is what could we do, Chairperson McGinty, this Committee, to, in fact, more effectively implement NEPA?

Ms. MCGINTY. I think that this hearing is a very good start. I would like collaboratively to join with the Congress in ensuring the

implementation of NEPA. The statute, as written, and the regulations, as written, call for the very kind of thing the Governor is calling for, as well, and it only makes sense.

We should have coherence and coordination among the Federal agencies. We should have state and local governments at the table helping us to fashion our decision. We should act in a timely fashion.

These are things that are called for, but, frankly, it's a big job to ensure that they are actually being implemented.

Mr. VENTO. Well, it's hard to play catch when someone throws the ball straight up the air, isn't it?

Ms. MCGINTY. Yes. One thing I would mention, Mr. Vento, the issue has been raised several times about whether or not states and county governments are being given or afforded the opportunity to be joint lead agencies.

In fact, there are many instances right now where that is happening and the one that specifically comes to mind is in Yellowstone, where the State of Montana is a joint lead agency with us.

Mr. VENTO. What could you—one of your tasks is to try to mediate disputes. It seems one of the problems here—I guess we're dealing with land issues. As I looked at the list of witnesses, it looked like mining, logging, a lot of interesting issues. I didn't see recreation witnesses in there, but—

Chairman YOUNG. They don't have to file a NEPA analysis.

Mr. VENTO. They don't have to file a NEPA. Well, I disagree that some recreation impacts would and do and have necessitated. But let me get back to the witnesses, Mr. Chairman. We can debate amongst ourselves any time.

But one of your roles is to try to mediate disputes between agencies. In a sense, this is a coordination effort here. Obviously, you can argue about who should take a lead and who shouldn't. I think we also make a lot more heat than light with regards to the lack of collaboration, because I find it to be generally very close.

But you have to have someone there willing to catch the ball and cooperate on the issues rather than frustrate the decision, as happens when we try to locate little things like nuclear waste sites and so forth, you know. It isn't always positive, guys, you know.

But what about the coordination and how we can get that? We're also resisting a lot of debarkment inertia in terms of trying to hold onto their own turf.

Ms. MCGINTY. Yes. Right.

Mr. VENTO. So you've got a major job. We talked about cutting your staff in half since what it was in 1992. What can we do to, in fact, enhance that ability to give you more authority or at least some carrots here to incentivize the agencies and departments to, in fact, cooperate?

Ms. MCGINTY. Well, this sounds like an opportunity not to be missed and I would refer the Committee to the President's budget request. But in addition to that, I think more often than not, Mr. Vento and members of the Committee, it comes down to providing that forum where agencies can be brought together.

It's not about at all questioning anyone's decisionmaking authority, but respecting the expertise that's brought to bear by the variety of agencies. We have, I think, shown that when the Forest

Service, for example, now works cooperatively with the Fish and Wildlife Service, that their mutual interest can be advanced in a much better and effective way.

Mr. VENTO. There is also a learning curve in there, learning how to write these statements today. It's much more effective than what it was when it was uncertain in that litigation that is put in is not always in good faith, is it?

One of the things—if I call you and ask you and have a problem in my district, I have a right to expect you to respond, don't I, as the Council for Environmental Quality with regards to NEPA?

Ms. MCGINTY. Yes, absolutely, and that is, of course, one of the missions we are charged with under the National Environmental Policy Act.

Mr. VENTO. And you are also charged with coming up with proposals and helping prepare the annual report for the President that's supposed to be due in July, and with coming up with other initiatives.

So your responsibility in terms of the Council of Environmental Quality is very broad besides NEPA. And so to have cut this budget this way obviously is a self-fulfilling prophecy with regard to the unworkability of NEPA in the last 5 years.

Thank you, Mr. Chairman.

Chairman YOUNG. The gentleman's time has expired. The gentleman from Utah.

Mr. HANSEN. Thank you, Mr. Chairman. Mr. Chairman, I think the Governor was right. When he's speaking to the Federal Government, the Federal Government should be consistent and speak with one voice. Ms. Norton says state governments should work together with the Federal Government.

I don't mean to beat up on an old horse here, but Ms. McGinty is fully aware that I subpoenaed many documents from the Administration with regard to the creation of the Grand Staircase-Escalante. One of those documents was from the ANDALEX coal mining proposal of the Kaiparowits Plateau.

It is significant to note that the EIS was about to find that there was no significance impact. The document shows that people in higher positions didn't want that to happen. Another document I subpoenaed went like this. It was a dialog between Mr. John Leshy, the—you know who he is, and some other folks in Interior, and the document notes that NEPA compliance is still necessary when an agency proposes a creation of a national monument.

The gist of the whole idea is this; if an agency proposes the idea, you have to do NEPA. If the President proposes the idea, you don't have to comply with NEPA. Then CEQ spent the next 7 months trying to get the President to sign a letter, so that it could be his idea, and the interesting thing is, it's great reading if you're bored some night and you want to keep awake, is the letters between CEQ and the President of the United States, getting him to sign this letter so they could go down and do this.

Then why did they do it? Other documents we got are very, very clear. They did it just for political purposes. The environmental community would wildly accept that.

Now, I don't have any fault with what you do. This is hindsight. Maybe we can eat this one and live with it and kill the economy



of southern Utah, but what the heck, we got some political mileage out of it, so why do we care.

Mr. Chairman, I would like unanimous consent to put in the record a work by our Committee, your people, Behind Closed Doors-The Abuse in Trust and Desecration of the Establishment of the Grand Staircase-Escalante National Monument.

Chairman YOUNG. Without objection, so ordered.

[The information will be included in the Committee files at 1324 Longworth House Office Bldg, Washington, DC.]

Mr. HANSEN. I'd like to add, now that that's behind us, I feel better. Thank you, Ms. McGinty, for allowing me to say that.

Would you look at that thing right there in front of you?

Ms. MCGINTY. I think I have it.

Mr. HANSEN. You've got a copy of that.

Ms. MCGINTY. I've got a copy of it, yes.

Mr. HANSEN. Well, I notice you folks are going to waive NEPA on a blow-down that happens to be going on in Texas at this particular point. What you see in front of you is the Dixie National Forest. The Dixie National Forest is one of those beautiful forests that wasn't a forest until we started managing it in southern Utah over 150 years ago.

Now, they have a little infestation of pine beetle in that area and the supervisor of the forest, a Mr. Hugh Thompson, he said, "I can go in there and cut those 30 acres out and it will be gone and the strong force can replant those 30 acres."

Now, as you look at the picture, you will see, in different areas, it's a dead forest now. And as an old pilot, I like flying over that area and I see these dead, dead trees staring me in the face.

Why is that? Because the environmental community has taken it upon themselves to file a lawsuit against the Forest Service every time, so we can't take care of it. So we've got a dead forest now and I'm wondering why we do that. But because we do have a dead forest, it would seem applicable to me and very important and a great analogy if you're going to waive the blow-down in Texas, that you further look at that picture on the far side where you've got dead trees, and grant a waiver for the Dixie.

I could bring to this Committee, and in front of you, dozens of experts who will say one thing—the possibility of having a fire in the Dixie is 100 percent. The possibility of a flood behind that is 100 percent. And all that topsoil that's taken 150 years is now a big mucky mess down in the valleys of Utah and southern Utah.

I would hope you would give that some consideration in waiving NEPA here. We have an emergency on our hands. We've got a big problem. I would implore you to give it some thought.

After what I said to you earlier, I don't know if you will, but anyway, I thought I would—do you want to respond to that?

Ms. MCGINTY. If I might. Thank you, Mr. Congressman.

Mr. HANSEN. I would appreciate it.

Ms. MCGINTY. Yes. And to harken back to Congresswoman Chenoweth's comments earlier. I want to make one clarification. In Texas, as here, if the issue were brought to us, we would not be waiving NEPA. NEPA has emergency provisions in it. In all cases, we are executing NEPA.

The difference between the situation in Texas that the Congresswoman points out and your situation is only that the Forest Service came to us with a request there and we acted on it immediately and granted it. We have not received a request from the Forest Service with regard to the Dixie.

And I agree with you, I have been to the Dixie, it is beautiful. Chairman YOUNG. Would the gentleman yield?

Mr. HANSEN. I yield to the Chairman.

Chairman YOUNG. Are you trying to tell me that if the Regional Supervisor now decides not to do this, you have no say in it?

Ms. MCGINTY. There is—what I am saying is that under NEPA itself, there are provisions for emergency procedures and should that forest need to execute emergency procedures, there is full provision for that to be provided within the bounds of the statute itself.

I would just offer one other example, which is Idaho. Last year, we did follow emergency procedures in Boise at the request of Congressman Crapo and Senator Kempthorne, when there was a dangerous fire situation, a flooding situation there.

Mr. HANSEN. Excuse me. Let me say, the Forest Supervisor in this particular forest has asked for emergency things here. Apparently, his higher-ups, his betters have not seen it upon themselves to do it. They have told me they've done it because of environmental reasons.

That's not fair, in my mind. I mean, I didn't think those guys handled the forest. I thought scientists did it and managers did it.

Ms. MCGINTY. It is, as I say, Congressman, the first I've heard of it and if the Forest Service wants to come forward and talk to us about it, we would talk to them immediately about it.

Mr. HANSEN. So if I subpoenaed the Forest Supervisor back here and put him under oath and he says it, is that what I've got to have to get it in front of you?

Ms. MCGINTY. Under normal circumstances, what he would do to invoke these emergency procedures is he would put together a process that he would consider the appropriate emergency process. And as we've done in Idaho, as we did last week in Texas, that process would then fulfill the requirements of NEPA.

Mr. HANSEN. Well, the problem is the person on the ground does it, but for somebody up above, living in the beltway of Washington, doesn't see the necessity of it, and, therefore, we're stuck.

Ms. MCGINTY. And as I'm saying, this is the first I've heard of the situation. I would be happy to talk to the various parties, Washington and the Forest Supervisor on the ground to see if we couldn't facilitate some discussion there.

Mr. HANSEN. I appreciate that. I'll have him talk to you. Thank you so much.

Ms. MCGINTY. Thank you very much.

Mr. HANSEN. Thank you for your time, Mr. Chairman.

Chairman YOUNG. Mr. Hinchey.

Mr. HINCHEY. Thank you very much, Mr. Chairman, and thank you, ladies and gentlemen, for your very fine testimony. I enjoyed listening to it very much.

Madam Chairwoman McGinty, NEPA, I think, as you have indicated in your testimony, has been an extraordinarily valuable piece

of legislation and that has served the country extremely well over the course of the last 30 years.

In addition to a great many other things, it has simply prevented us from making some very serious mistakes, in that it provides the opportunity for close and careful analysis to projects and programs before they get started.

Part of that process is the public participation. It seems to me that there have been a number of examples where public participation has just been extremely valuable and that particular part of the process is so essential.

Can you comment on that, from your experience, how public participation and how information from the public has been valuable in making things work better and preventing mistakes from being made?

Ms. MCGINTY. Yes, absolutely. One example that just comes to mind is in South Carolina, where a classic train wreck situation, they need to put a new bridge in, but it would seem to be unavoidable destruction of some very pristine wetlands resources.

No one could figure out how to resolve what seemed to be an irreconcilable conflict, until the public came along and said we live in this community; we have an idea as to how you could relocate that bridge, redesign it, still provide the essential transportation that we want, too. We live here, we want the transportation services, but also in the context of doing that, save and preserve those wetlands.

The upshot was public happy, wetlands preserved, and \$54 million saved, because the new bridge was actually more cost-effective than the old design would have been.

Mr. HINCHEY. I think that kind of example is indicative of the reasons why, when you speak to people about this program, and the state initiatives that have been sired by NEPA, the State Environmental Quality Review Act, for example, I know, I'm very familiar with that in New York and the way it works.

The public overwhelmingly supports these pieces of legislation for the very valuable contribution they have made and the enormous amount of money that they have saved, both nationally and for state governments, in the last 28 years or so.

Ms. MCGINTY. Very true. I offered an example in my testimony of Admiral Watkins testifying about this. He says thank God for NEPA because through that process, a tremendous amount of money was saved in identifying a much more sound technology.

Mr. HINCHEY. In your testimony you have identified the need for additional funding for the reinventing initiative. Can you tell us how much you requested in the budget and give us some idea of what that money would be used for?

Ms. MCGINTY. Yes, sir. It's on the order of a half-a-million dollars, a rounder, I must say, with regard to most agencies. But it's very important to us because it would be funds dedicated to the reinvention project itself, funds dedicated to have people outside of the fire fight of the issue-by-issue crisis, looking programatically across the agencies to see how we can change the implementation of the Act so it works better for everyone and for all of the purposes we have been talking about here today.

Mr. HINCHEY. I thank you very much and I thank you for the contribution that you make as the chair of the Governors Council on Environmental Quality. That office has been extremely valuable and I can't think of a better person that's served in that position than the contribution that you have made in the time that you have been working through this Administration on protecting the environment of our country and saving substantial amounts of taxpayer dollars in the process.

Ms. MCGINTY. Thank you, Congressman. I very much appreciate it. Appreciate your leadership, as well.

Mr. HINCHEY. Governor Geringer, you were the sponsor, as I understand it, of the Western Governors Association in the 1996 resolution on NEPA. I would like, Mr. Chairman, unanimous consent to have that resolution included in the record, if it has not been so already.

Chairman YOUNG. It's already been included.

Mr. HINCHEY. Already been included. Well, thank you. The Western Governors resolution states that, among other things, as follows; "The broad goals and objectives of the National Environmental Policy Act are important and have improved the overall quality of decisions by Federal agencies."

Do you, Governor, feel that NEPA has improved Federal decisionmaking processes and the outcomes of those decisions?

Mr. GERINGER. Mr. Chairman, the answer is yes and that's why the qualifiers were in my remarks and I'm not sure if you caught all of them, where the process has bogged down and has become more of a judicial process than a participatory process.

Mr. HINCHEY. But you feel that the process itself is very valuable.

Mr. GERINGER. The process can be very valuable, but we're about to have an impasse on how it might even be implemented. The benefit that can be derived from NEPA is at risk.

Mr. HINCHEY. But hasn't the process provided avenues of contribution for state and local governments, for Governors and for the public that didn't exist before? Hasn't that opened up the process and made valuable contributions in and of itself?

Mr. GERINGER. Well, you know, I come from a farming background and there's an old saying that if it ain't broke, don't fix it, and that may be where your line of reasoning is going. But there is also a concept that says if you see something that can be prevented, you try to head it off, and that's what we're here to do today, is to try to prevent the breakage of NEPA.

Mr. HINCHEY. I'm of the opinion that anything, no matter how good it seems, can always be improved. I'm not of the school of if it ain't broke, don't fix it experience, frankly. I think that anything can be made better and I have no doubt that this could be made better.

But my point is that it has provided invaluable service to us over the course of the last 28-29 years. Saved an enormous amount of money, prevented an awful lot of mistakes from being made, and I think your statement in 1996 just makes that as clear as could be.

Chairman YOUNG. The gentleman's time has expired. Governor, you can comment, though.

Mr. HINCHEY. Thank you, Mr. Chairman.

Chairman YOUNG. You can answer that.

Mr. GERINGER. I guess the response I would have is that if you see something that's headed for detriment or disaster, you try to head that off, and that was part of the reason for even raising that resolution, was to say we have the goals in mind, we understand the purpose, we'd like to see the benefit that has accrued in the past, where it has accrued, now let's see if we can't improve that and make it a general positive overall rather than seeing it die in the muck.

Mr. HINCHEY. Well, I agree with you.

Chairman YOUNG. The gentleman's time has expired.

Mr. HINCHEY. It can be improved, but I just don't want it to ignore all the contributions that have been made in the past.

Chairman YOUNG. The gentleman's time has expired. I have got to go to another—I have a bunch of students down there, I have to speak to them for a moment. Ms. Norton, I'm going to suggest to you, as Attorney General, if you can give me some ideas of how to improve this Act by writing some legislation, I would deeply appreciate it.

And, Ms. McGinty, I officially am going to ask you about the Chugach National Forest. We're facing a terrible fire problem, worse than anything you've ever seen, and we're having to face a fire NEPA requirement. Otherwise, they're going to wait until it burns and then it's going to be heard. We might lose two communities. It's a classic example of the stupidity of this Act and how it's not properly implemented.

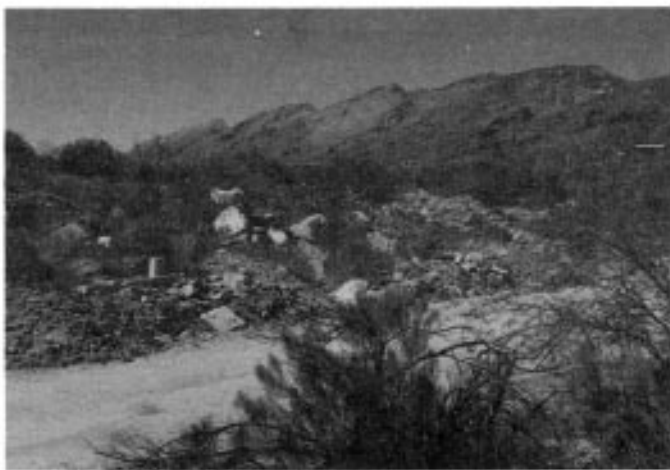
Lastly, my Forest Service down in Arizona is suddenly requiring a rod and gun club to file off a NEPA environmental impact statement 35 years after this rod and gun club began operating. Yet I have pictures here, and I'm going to submit them to you, of the Forest Service dump right next to the rod and gun club for which they never filed a NEPA requirement, and you'll want to look at some of these examples of your agencies. I have requested documentation from them. They have not given it to me yet. They are going to get subpoenaed, if they don't.

But this is an example of why there's such a real bad feeling about the agency. They require a rod and gun club, who never had an accident, to file an environmental impact statement and then they turn around and they have their own dump, and they never had an environmental impact statement on that adjacent Federal land.

So there are some real questions about how it's being implemented.

Mrs. Cubin is going to chair the meeting for a period of time.

[The referenced photos follows:]









Ms. CUBIN. [presiding] Thank you, Mr. Chairman. The next person in line for questioning I believe is Representative Pombo.

Mr. POMBO. Ms. Norton, in your statement, you talked about a voluntary self-audit statute that was developed in Colorado. I would like to hear a little bit more about that and what your experience has been with that particular statute that was adopted in Colorado.

Ms. NORTON. Thank you, Representative. While this is not directly on point with NEPA, it certainly has a lot to do with Federal/state relations in the environmental area. Colorado adopted a law that would make a self-audit privilege and some degree of immunity available to companies that want to see if they have any environmental problems.

It's essentially an incentive for companies to do voluntary self-audits and then to correct any environmental problems that they might find.

The State of Colorado felt, and this was on a bipartisan basis, felt that it would be more likely that companies would come forward, find problems and correct them if we rewarded them for that instead of bashing them for doing it.

The EPA has been fighting with us. They are looking at disapproving some of our programs because they think we need to punish companies that come forward with self-audits rather than providing them certainty about how they will be treated when they come into the regulatory process.

I testified yesterday in front of the Commerce Committee's subcommittee on that and I would be happy to provide you with a copy of my testimony.

Mr. POMBO. Yes. I would like that and I would like to explore somewhat what kind of a relationship that creates between the state agencies and the Federal agencies when you have that kind of a confrontational relationship that is being developed.

Ms. NORTON. We had, unfortunately, a very confrontational relationship. They sent—the EPA sent us a 23-page single-spaced list of essentially interrogatories about how our state statute would operate, and that's on a two-and-a-half page statute.

They have not allowed us to interpret our own law and have even questioned the way in which we interpret our own law. We're going into a negotiation process with them next week and we are hopeful that we will be able to maintain the spirit of Colorado State law.

We find it very disturbing that Federal agencies have not allowed us to determine whether our hypothesis is correct. Our hypothesis is that this will be beneficial for the environment. We can only find out if the Federal agencies will allow us to carry forward with our experiment.

Mr. POMBO. Now, Governor, in your statement, in your prepared statement, you talk about the relationship between the Federal Government and the states and you state in here that the Federal Government was created by the states, not the states by the Federal Government, and that you believe that the states should have primacy over environmental laws and over the laws in your particular state.

How has your relationship been in operating the state, in working with these different Federal agencies? Has it been cooperative? Have they always been willing to listen to your ideas and accept the solutions that have come up with people that live in your state?

Mr. GERINGER. As with many western states, the states feel more like they are the last to be sought out rather than the first, and that's why we brought these issues to the forefront. As the Act and the CEQ regulations point out, where there is a responsibility, and I mentioned several of those areas where the states, within their states, have primacy, the Clean Air Act, the Clean Water Act as examples, where the states have primacy, they are not consulted the environmental impact might be or to even do the environmental assessment that leads to the EIS.

It is that frustration that leads to delays, it leads to litigation, it leads to the costly expenditure of funds. If we were to just simply reallocate some of those inefficient expenditures, you could triple the size of the CEQ under the same budget.

Mr. POMBO. Have there been instances where your state has been named the lead agency and the Federal Government accepted the findings that you have come up with?

Mr. GERINGER. None in recent memory.

Mr. POMBO. None in recent memory? If this law was working the way that it was supposed to, would there not be instances that you could bring out?

Mr. GERINGER. That would certainly be our goal, Representative, and as I look at the CEQ regulations that deal with exactly that point, it says that the agencies of the states should be consulted to eliminate duplication of other procedures.

It talks about joint planning processes, joint environmental research and studies, joint public hearings, joint environmental assessments, and it says unless those state agencies are specifically barred by some other law, they shall be consulted.

That's pretty directive.

Mr. POMBO. And have your consultations been in the manner in which is suggested in the law?

Mr. GERINGER. No.

Mr. POMBO. Do they normally come by and meet with you before a decision is made?

Mr. GERINGER. Typically after. We should look at the planning process and at the scoping process, which can be very helpful in guiding toward an outcome and a more efficient way time-wise, as well as study-wise. Perhaps as an indication of that, one of the land management agencies in the west developed its strategic plan and after they had gone through the whole process of strategy, listing objectives, goals, strategies to get there, then they dropped it off.

So even in the entire realm of resource management, not just the EAs or EIS's, the attitude seems to be we have to comply with our regulations first and then we'll go to the states.

As we discussed an overall reinvention, to use that word, with a group of people that Katie McGinty made reference to, the Institute for Environment and Natural Resources at the University of Wyoming, another Federal agency said, you know what this really means is that we're going to have to rewrite all of our regulations.

And I kind of said, "Well, duh."

Mr. POMBO. Thank you.

Mrs. CUBIN. I think that it's actually my turn to ask questions, even though I'm sort of not in line over there.

Governor, you just read an excerpt that said that the—to paraphrase—that the different governmental entities shall be consulted. Now, I think what we ran into with Cave Gulch in the Natrona County area was that the Federal agencies said, well, we consulted them in the scoping process and their input in the EIS, but did not grant them cooperating agency status.

And to me, that—I mean, I don't know. So Senator Thomas has a bill that he introduced in September 1997 that includes—there's just three words. It says that Federal, state and local entities should be considered as cooperating status agencies.

Would you agree with that legislation? Would you support it?

Mr. GERINGER. I do. In fact, Madam Chairman, I think it's the simplest bill I've ever seen.

Mrs. CUBIN. Isn't it nice?

Mr. GERINGER. It's about a three-word change to an entire document, and the change perhaps suffers from the disadvantage of being logical.

Ms. CUBIN. As we recall, it's usually those 500 pages that pass just like that and these little ones are a little bit tougher.

Ms. McGINTY, do you support that legislation?

Ms. MCGINTY. Let me say I am very supportive of—

Ms. CUBIN. No, no, no, no, no. No. The legislation.

Ms. MCGINTY. The legislation? No, I don't support the legislation.

Ms. CUBIN. And why is that? Because that seems to contradict the testimony that you've given here today.

Ms. MCGINTY. Well, first, I think as this Congress has said repeatedly, we don't necessarily need new laws and more laws and more regulation. The provision that you referred to—

Ms. CUBIN. Your testimony has been that amply provided for and it's a question of whether the agencies are implementing that. I think the Governor can testify that every time an issue like this has been raised, to me, we have worked to effectuate that provision of the regulations which gives the states and the counties a seat at the table.

Ms. McGINTY, honestly, I can tell you firsthand that you may have worked toward that, but the length of time that it takes turns out to be quite costly for the private entities that are waiting—and then when the final result comes out, many, many times what the states, counties and local governments have considered to be pertinent has been disregarded, particularly when we talk about socioeconomic impacts.

But we are going to have a second round of questioning. To me, it seems extremely contradictory that you can sit here and tell us how you want all this input, you want this, but then when it comes down to the nitty-gritty, it isn't there. It sounds a little disingenuous.

But I'll get back to that line of questioning on the second round, because at this time I would like to ask the Governor some more questions.

Do you think or are you aware of circumstances where the roadless area moratorium prevents any activities that are needed and that by not doing, will have an adverse impact on the environment?

Mr. GERINGER. Madam Chair, the roadless moratorium through the U.S. Forest Service has a more far reaching effect than what has been publicized. I think the first group that we heard from, or heard about, was the timber industry. We've seen already limitations on our state agencies that oversee wildlife management, resource management, such as stream gauging for water, the opportunity for recreation and hunting.

The impact on the full range of activities on the lands and management as far as the environment goes is more significantly impacted than just the timbering industry, although that's been the only focus.

So the decision of the chief of the Forest Service to impose a moratorium probably is subject to his own NEPA requirements. I don't think he thought beyond just the impact of building roads for timbering. What we see through the roadless moratorium are effects that more significantly impact other areas than just timbering.

Ms. CUBIN. How does NEPA or does NEPA, in your opinion, address the socioeconomic impacts on local communities and does this moratorium have an effect on local communities and, if so, what is that effect?

Mr. GERINGER. Well, the moratorium has, with other examples, the general trend among the Federal agencies is to say that social and economic impacts are not a part of the environment, and that's why I made the reference, Madam Chair, in my remarks to the fact that when it comes down to it, poverty and loss of community are definitely part of the human environment, which were mentioned consistently in the Act and in the regulations.

Impact on inter-generational sustainability, all those are issues that involve an interrelationship. Even the CEQ regulations acknowledge that there is an interrelationship between environmental and economic issues.

I certainly heartily endorse what Chairwoman McGinty has said, that that relationship between economic, environmental, and social issues has to be recognized.

Ms. CUBIN. Do you think it has been in the past?

Mr. GERINGER. I think it's been—because the pendulum tends to swing one way or the other. At first, there was a tremendous swing toward just environmental protection.

Ms. CUBIN. And what time-frame would that have been in?

Mr. GERINGER. That was back in the late 1960's, early 1970's. And now, with the advantages that have been gained through that, that's been overshadowed by a swing that needs to return back to more of a neutral position, where there is a balance between limitations on economic activity.

It's as though humans are not a part of the environment and I think we ought to recognize that they are.

Ms. CUBIN. One last question, very quickly. Are grazing permits in your state, in our state, being renewed or delayed by NEPA and what effect is that having on the economy for the entire state?

Mr. GERINGER. As with anything, if there is a delay in the permit processing or application, you miss the timing of an event.

Ms. CUBIN. So there are delays?

Mr. GERINGER. There is definitely an impact on how that applies.

Ms. CUBIN. Thank you very much. Congressman Chenoweth.

Ms. CHENOWETH. Thank you, Madam Chairman. Ms. McGinty, last time you were before the Committee, we discussed the American Heritage Rivers Initiative. That was September 24th of last year. You testified that the initiative's authority lies in Section 101(b)(4) of NEPA.

I have a copy of NEPA and I have studied that pretty carefully. I asked for a legal analysis as to why you believe that that section, which simply lays out the policies and the goals of the Act, why that would have any actual authority in it.

As I read it and as other attorneys have read it, it has none whatsoever. I have not received that legal analysis yet and so I would very much appreciate receiving that.

Ms. MCGINTY. Thank you, Congresswoman. And in addition to other venues where we have discussed this, that analysis, of course, is fully laid out in our responsive brief to your brief in the lawsuit you filed against us and that the court has dismissed.

Ms. CHENOWETH. That is being appealed. But I asked for a legal analysis to be sent to the Committee.

Ms. MCGINTY. Sure. Happy to do that again.

Ms. CHENOWETH. So if you would do that. You also indicated in your testimony here that there was some language involving emergencies and exemptions in NEPA.

Ms. MCGINTY. Yes.

Ms. CHENOWETH. That would allow forest supervisors to be able to exempt certain environmental processes under NEPA.

Ms. MCGINTY. Design wholly new processes that fit the emergency situation at hand, yes.

Ms. CHENOWETH. Where is that located in NEPA?

Ms. MCGINTY. It is in the regulations and I would have to respond for the record in terms of the exact provision in the regulations. But any natural resource manager can approach CEQ and say I have an emergency situation on my hands, I propose these emergency procedures.

Ms. CHENOWETH. So it's not in the law? It is? OK. It's in the Code of Federal Regulations.

Ms. MCGINTY. The Code of Federal Regulations, yes.

Ms. CHENOWETH. All right. And it's also in the National Forest Management Act, too.

I wanted to ask you several questions and they'll go pretty quickly. Included in your funding request before Congress are funds needed to support the American Heritage Rivers Initiative, isn't that correct?

Ms. MCGINTY. Well, we do not have a specific line item on that initiative. It is part of our overall effort to reinvent the way that environmental programs are implemented.

Ms. CHENOWETH. Did you know that Section 624 of the Treasury Postal Act states that no part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized Executive-Legislative rela-

tionship, for publicity or for propaganda purposes, for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.

So there are statutes that tend to limit your activities in this area, is that not correct?

Ms. MCGINTY. Yes. Congresswoman, I am aware of that statutory provision.

Ms. CHENOWETH. Let's look at the compliance with Section 624 of the Treasury Appropriations. We'll focus first on the publication and distribution of literature, even though that is only part of the prescription of the statutes.

You have distributed editorials, articles and feature pieces in key media outlets and publications that use and reflect the tone of key messages in this plan. Would you call that a publication or distribution of literature?

Ms. MCGINTY. Well, I will absolutely say that we have engaged in extensive communication and outreach to the public on the American Heritage Rivers Initiative, as on any initiative that we have been involved.

Ms. CHENOWETH. And you've flown—you personally have flown around the country, as well as have your staff, to push the American Heritage Rivers Initiative, to give speeches and to promote the public support. Is that not correct?

Ms. MCGINTY. I would be hard pressed to think of an invitation from citizens around the country that we have denied, when they have asked us to come and visit with them about this program. I can't think of one request for information or our personal presence that we have said no to.

Ms. CHENOWETH. So your answer—

Ms. MCGINTY. We have been there when asked.

Ms. CHENOWETH. So your answer is yes, right?

Ms. MCGINTY. We have responded to the invitation of Members of Congress or individual citizens who have asked us to come and answer their questions.

Ms. CHENOWETH. The American Heritage Rivers Initiative program will be costing between five and ten million dollars, is that not correct?

Ms. MCGINTY. The American Heritage Rivers program will seek the better coordination and distribution of the programs and resources that are already provided for in a variety of different statutes.

Ms. CHENOWETH. And that amounts to about five to ten million dollars. Is that not correct?

Ms. MCGINTY. Congresswoman, I would have to respond for the record because there could be many programs that are better coordinated through this initiative, whether it is—an example I shared with the Committee before, making available to communities Defense Department software which enables—

Ms. CHENOWETH. That's not quite the question I asked.

Ms. MCGINTY. Well, I use it only as an illustrative example of why it's hard for me to put a specific price tag on it.

Ms. CHENOWETH. Well, let me make it easier for you, Ms. McGinty. The American Heritage Rivers Initiative has a new web site, is that not correct? And it contains materials, such as speech materials and so forth, but it does have a web site.

Ms. MCGINTY. Since its very inception, again, as a matter of being able to have the public have as much information as they need, from its very inception, we have had a web site.

Ms. CHENOWETH. Is that the publication or distribution of literature?

Ms. MCGINTY. From a legalistic point of view, I would have to again respond for the record, but certainly the whole point of it is to provide information to the public.

Ms. CHENOWETH. Let me wind this up. Even using the narrowest construction of the narrowest section of Section 624, the prohibition, which was signed into law by the President and it is now the law of the land, right? And since it's the law of the land, you are bound by its provisions, right?

Ms. MCGINTY. Absolutely.

Ms. CHENOWETH. Do you believe that one of your responsibilities is to obey the law?

Ms. MCGINTY. Absolutely.

Ms. CHENOWETH. Even by the very narrowest construction of Section 624, that prohibition which reaches any activity of the publication or distribution of literature, we have just identified a number of violations of that statute alone.

Can you really say that you're complying with Section 624? You did say for the record you were familiar with it.

Ms. MCGINTY. Absolutely and without doubt.

Ms. CHENOWETH. You are complying with it.

Ms. MCGINTY. Absolutely and without any hesitation or doubt whatsoever.

Ms. CHENOWETH. I do want to say I will let your answer stand, but I do want to say that, for the record, the case was dismissed in the American Heritage Rivers Initiative. It will be appealed. It was dismissed simply on standing and not on the merits of the case. We will be perfecting the standing issue and we will be back.

Thank you.

Ms. CUBIN. Thank you, Ms. Chenoweth. Mr. Hill.

Mr. HILL. Thank you, Madam Chairman. Katie, I wanted to stay on this issue of American Heritage Rivers, just for clarification. When you appeared here earlier, you made a clear statement that if a Member of Congress wanted to withdraw applications from within their district, they would have veto power over any application. Do you agree with that earlier statement?

Ms. MCGINTY. Yes, absolutely.

Mr. HILL. And that is still the position of the Administration.

Ms. MCGINTY. A Member of Congress has veto authority over a river that runs through his or her district, absolutely.

Mr. HILL. I wrote to you in December and again in January asking that Montana be withdrawn. I just yesterday received a letter from you confirming that the Yellowstone River will now be included. There are other applications pending in Montana. Can I expect that those will receive confirmation that those with also be withdrawn?

Ms. MCGINTY. Congressman, if you are requesting that every river in your district be withdrawn from the program, as I have said before, that is your right to do that and it would be withdrawn.

Mr. HILL. Well, let me read to you what I wrote to you, just so we're clear about this.

Ms. MCGINTY. Yes.

Mr. HILL. So that we don't have to exchange more correspondence. In December, I wrote to you and I concluded the letter saying that I respectfully make the request that the Yellowstone and its tributaries and other rivers in Montana not be considered as part of the American Heritage Rivers Initiative. I believe this request should be honored in light of the above statements.

Your office said you weren't clear and would you write again. And so I wrote again January 21st and I opened the letter with this. I am once again writing to inform you of my request to not include any of Montana's rivers as part of the American Heritage Rivers Initiative. Despite my long-standing statements of concern and a previous letter requesting Montana not be considered part of the initiative, I am mystified over your staff's insistence on the need of another letter and communication on this issue.

Do you think that that's clear, in your mind, that I wanted all of Montana rivers withdrawn?

Ms. MCGINTY. I think I understand fully the question you're posing, yes.

Mr. HILL. So can I then be assured that Montana rivers will not be considered?

Ms. MCGINTY. I hesitate to ask this question, but, Congressman, as I understand it, you are the only Congressman from Montana.

Mr. HILL. I represent all of Montana. And, incidentally, Senator Burns also asked to be out of the program.

Ms. MCGINTY. The answer is yes.

Mr. HILL. So that's clear, because these are still on the web site as being under consideration, the other applications. Will they be noted and removed?

Ms. MCGINTY. It is clear that you have now and with your letters previously withdrawn rivers in Montana from consideration. Yes, sir.

Mr. HILL. Thank you. And as you know, the Committee has had a great interest in this issue. On February 10, you were sent a letter from Representative Bob Schaefer and 60 other members, including 15 from this Committee, requesting that the Blue Ribbon panel of experts on the American Heritage Rivers, which is to be named, I guess, will hold a day of hearings in Washington at its regularly scheduled meeting.

What decision have you made to accommodate that request for public hearing in D.C. by this panel of experts?

Ms. MCGINTY. Let me say, Congressman, that the whole thrust and, I think, related to Congressman Chenoweth's questions, the whole thrust of this initiative has been public participation and outreach. You will see no difference as we—in fact, the FACA itself is about having the public involved in making the decision. It will be an open process. There will be opportunity for the public to be involved.



I would like, however, to have those FACA members appointed so that they can also be responsive to you with regard to the details.

Mr. HILL. Thank you. Going over to the NEPA process itself, is it your view that NEPA requires that the social and economic impacts— aspects, I would put it—should be integrated into the alternatives that are proposed?

Ms. MCGINTY. Absolutely. NEPA is triggered when there is a significance—when a significance action of the Federal Government will have major impact on the environment. But once triggered, it calls for environmental, social and economic analyses.

Mr. HILL. And integration.

Ms. MCGINTY. And integration, yes.

Mr. HILL. The point I'm getting at is that these should always be integrated into the alternatives. Would you agree with that?

Ms. MCGINTY. I absolutely agree, yes.

Mr. HILL. Have you spent any time looking at the Interior Columbia Basin study?

Ms. MCGINTY. Some.

Mr. HILL. And the proposed management plan. One of the complaints about that, and, frankly, I mean, I think widely accepted, is that the social and economic impacts have not been integrated into the alternatives.

As a matter of fact, what has happened is that the alternatives have been analyzed in terms of their impact on the social and economic considerations, and that's a substantial difference. Would you agree?

Ms. MCGINTY. I would agree and would be happy to pursue it with you. I am not as familiar with those details, though.

Mr. HILL. And going to the road moratorium. Do you believe that the road moratorium is subject to NEPA?

Ms. MCGINTY. In fact, there is a NEPA process underway on the road moratorium proposal, yes, sir.

Mr. HILL. And the social and economic impacts would be considered as part of those integrated into the alternative that has already been selected.

Ms. MCGINTY. I very much believe that the social and economic impacts should be considered. Now, I will tell you—

Mr. HILL. No. Integrated. We said earlier integrated.

Ms. MCGINTY. I want to share with you what I think is a problem and it has been an issue over the years, and that is whether or not social and economics get into environmental assessments, as well as EIS's. It's my view that they should and I would just share with you that I think it has not been the practice that the social and economic concerns are as fully integrated into EAs as they have been in EIS's, and I think that that's an area for change and improvement.

Mr. HILL. Madam Chair, if I could just ask one more question. In the process of the development of this road moratorium, did you have discussions with Chief Dombeck with regard to the NEPA aspects of this and the advisability of this policy?

Ms. MCGINTY. I did have conversations with him on both the policy overall and the NEPA application, too.

Mr. HILL. And when did you initiate those discussions?

Ms. MCGINTY. I would have to respond for the record, but I certainly did have several conversations with the Chief.

Mr. HILL. Could you give us an approximate time when you think—you had several conversations.

Ms. MCGINTY. Yes.

Mr. HILL. But do you have an idea of when the first one might have been?

Ms. MCGINTY. In the fall perhaps.

Mr. HILL. Fall of 1997?

Ms. MCGINTY. Late fall perhaps of 1997, just before Christmas.

Mr. HILL. I find that interesting because Chief Dombeck, in his testimony, advises that he had no conversations with you with regard to the road moratorium issue.

Ms. MCGINTY. Well, I would have to see what specifically he was referring to, but I was apprised. I did discuss with him the road moratorium.

Mr. HILL. Thank you, Madam Chairman. Thank you.

Ms. CUBIN. The gentleman from Utah, Mr. Cannon. That's OK. I was going by seniority, but if you two can work it out. The gentleman from Nevada, Mr. Gibbons.

Mr. GIBBONS. I appreciate your kind consideration.

Ms. CUBIN. I'm just trying to fair to you.

Mr. GIBBONS. And the senior gentleman from Utah that's also here. Ms. McGinty, I just want to followup with what Mr. Hill said about the American Heritage Rivers Initiative. I also sent you a communication, a letter requesting an exemption from all rivers in the 2nd District of Nevada. The 2nd District of Nevada is 99.8 percent of the territory of Nevada, except for the downtown urban area of Las Vegas, which has no rivers.

I have yet to hear back from you on our request. Can I assume then, because of our request for exemption, that no river in that area of the 2nd District of Nevada will be included?

Ms. MCGINTY. Yes, sir.

Mr. GIBBONS. Thank you. All this talk about consultation with states over environmental projects and actions that are taking place and local governments, would you sort of balance out, for my education, Yucca Mountain in Nevada and the DOE's action and state consultations?

Ms. MCGINTY. Yes, sir. In terms of what the state consultations that have been had or have not been had, I am not aware of the details with regard to that specific issue. But I think the issue is very illustrative to come back to the legislation that Congresswoman Cubin had raised.

I would think some members of the Committee might give cause to the notion that the county in this case in Nevada would have decisionmaking authority, for example, as to whether Yucca Mountain would go forward.

Mr. GIBBONS. Or even the State of Nevada.

Ms. MCGINTY. Or if the State of Nevada would have that kind of authority and, therefore, might want to take a second look at the proposed legislation. I think Yucca Mountain is a very good example as to why a broad-brush approach doesn't necessarily serve everyone's interest.

Mr. GIBBONS. In other words, what you're saying is the State of Nevada should have no say in this issue.

Ms. MCGINTY. No. I would say very strongly that the State of Nevada should. I am just suggesting that some members of the Committee may have some pause about that, given the legislation that's been introduced, for example, to override the state's views on the Yucca Mountain issue.

Mr. GIBBONS. Ms. McGinty, moving on, what actions are you specifically taking to expedite the time delays between the time an environmental impact statement is asked for and the time it is granted and the permit is granted? Today we are seeing numerous years, hundreds of thousands of dollars expended, jobs at risk in order for many industries to get a permit.

Ms. MCGINTY. Yes.

Mr. GIBBONS. And it is an unreasonable—in fact, it's an indefensible practice to delay, delay and delay. I want to know what you are doing to change that and I would like you to tell us what a reasonable period of time would be for you to issue a permit.

Ms. MCGINTY. Well, sir, first of all, I do not issue permits, but let me respond to the thrust of your question. First, I have begun to resurrect that part of the regulations which gives the permittees the right to negotiate a NEPA schedule, so that there would be a schedule that is agreed upon.

Another initiative that we have begun and related to that is that there would be performance indicators for an agency, which indicators would include how many times have you granted a permittee the right to negotiate a schedule with you.

Related to that, I want to come back to one of the suggestions that Governor Geringer had made, because I think it's one of the most important new phases of natural resources management, and that is the idea of adaptive management. Get on with the process, get on with the project now, with the idea that you monitor it and you can change course if need be down the road, but don't wait until the perfect documentation or the perfect scientific thesis is written.

Mr. GIBBONS. Well, what problems I see in all of that proposal about a negotiated time schedule is that it holds agencies and industries hostage. It holds them hostage because only those that can afford to pay will get an expedited EIS.

The cost of these EIS, environmental impact statements—

Ms. MCGINTY. Yes. Yes.

Mr. GIBBONS.—is an enormous burden that ends up being delayed and delayed throughout the practice. I just wanted to get an estimate of the time you thought would be a reasonable time and I see that that's a little bit complicated to come up with a direct answer.

And I just wanted you to also look at this picture, that is the Dixie National Forest in Utah, and take out the meadow that you have there in the foreground and put Lake Tahoe in it and it will show you the same theme, the same picture, with a lake in the middle, that has beetle-infested, fuel for a dangerous, disastrous, deadly forest fire, and would ask that if we come before your agency to show you the same conditions, will you grant that agency emergency waiver status to deal with that problem?

Ms. MCGINTY. If the Forest Service comes forward, as you're suggesting, with an application for emergency procedures, we would sit down with them immediately.

Mr. GIBBONS. So it's not the forest manager.

Ms. MCGINTY. It can be the forest manager. It can be the person who is on the ground, the forest supervisor. Yes. I think that, in fact, was the case in Texas. We deal with the people that were right there on the ground.

Mr. GIBBONS. That's what I want to get. I just want to find somebody that I can go to.

Ms. MCGINTY. Yes.

Mr. GIBBONS. That's identifiable. I don't want a big, broad agency. I want the manager of this forest to come to you and if I can do that, you will grant him an emergency waiver.

Ms. MCGINTY. I would have to work with him or her on the specifics of it. It's not a carte blanche, but it is—there is an opportunity for emergency provisions in the statute and I would be very happy to work with that forest manager if there is an emergency situation, yes.

Mr. GIBBONS. I see my time has expired, Madam Chairman. Thank you very much.

Ms. CUBIN. Before I recognize Congressman Cannon, I do have to make a point, since you brought up the cooperating agency status and said that Yucca Mountain might be why the Thomas bill is not needed.

I have to point out that because an entity or a governmental entity has cooperating agency status does not mean that they can direct unilaterally what the result of the EIS or the EA or the recommendation will be.

So they are just at the table and have a bigger role. So I think that your statement supports my position.

Mr. Cannon.

Mr. CANNON. Thank you, Madam Chair. Gale, it's nice to see you again, and, Governor and Ms. McGinty, I appreciate your testimony and the answers to the questions so far.

I am motivated a little bit by the gentlemen from Nevada and Montana who have asked you about their states being exempt, but unfortunately, I just asked my staff, we have not sent a letter asking that my district be exempted from the American Heritage Rivers Initiative.

I'm wondering if we can do that here just by my asking you.

Ms. MCGINTY. If you are asking that rivers in your district be withdrawn from consideration under this initiative, I hear that and you have every right to do that and they are withdrawn.

Mr. CANNON. As the head of the CEQ, you have the authority to put my mind at ease here on record with that, right?

Ms. MCGINTY. I'm happy to followup with a letter to this effect. But it is a provision within the initiative itself that a Member of Congress can withdraw rivers in their district from consideration.

Mr. CANNON. Thank you. I appreciate your doing that. If you would like to follow that up with a letter, I would like to get the letter. I'm still waiting for other things, I would remind you, from your agency.

You heard Congressman Hansen vent a little bit. I would like to go back over some of his concerns and actually hear what you think about that.

He characterized your discussions through e-mail with the solicitor of the Department of Interior, Solicitor Leshy, as agreeing that if an agency starts the process, then NEPA applies, but if the President starts the process, NEPA may not apply. Do you think that's a fair characterization of the law?

Ms. MCGINTY. I think it's actually a very important principle of law that Presidential action, whether it's NEPA or very many other statutes, those statutes don't apply to Presidential action, military defense, the international trade. The President is given prerogatives to act on behalf of the interest of the—

Mr. CANNON. In the case of the Antiquities Act, where you have a non-delegable authority, I think that was the context in which this discussion took place and the e-mails between you and your staff and Mr. Leshy and his staff.

Is that a fair characterization that, in fact, if the President starts it, it's possibly exempt from NEPA, but if the agency starts the process, then NEPA applies?

Ms. MCGINTY. It is absolutely the case that NEPA, again, as other statutes, do not apply to Presidential action. That is absolutely the case. And it's also absolutely the case, as you are suggesting, that should an agency initiate a process to declare—that would lead to the declaration of a national monument, I would have to respond for the record on that, where the lines are with NEPA's application or not.

Mr. CANNON. First of all, I'm just asking you about the characterization of the e-mail that went back and forth, which I know you read because you responded to the press about that. Is that a fair characterization of what went back and forth between your office and Mr. Leshy's office? That characterization being that the agency, in this particular case, under the Antiquities Act, begins the process, then it's subject to the requirements of NEPA.

Ms. MCGINTY. I do believe that is right. I would have to review the e-mail in question, but I do believe it is right. It is absolutely the case that NEPA does not apply to Presidential action. I believe what you are saying is right with regard to agency action.

Mr. CANNON. You're a lawyer, as I recall. Is that right?

Ms. MCGINTY. Not licensed to practice in any state of the union, however.

Mr. CANNON. Have you ever practiced law?

Ms. MCGINTY. No, I haven't. I went to law school. I worked for various firms during my summers in law school, but I have never practiced law.

Mr. CANNON. Did you look at this issue legalistically? I mean, lots of e-mail went back and forth and, in fact, many of those e-mails were, I believe, authored by you, saying that you needed the President's—a letter from the President to initiate the action so as to avoid NEPA.

Did you look at those letters as a lawyer or as a non-lawyer?

Ms. MCGINTY. Actually, the action was initiated prior to the President's letter. The action was initiated in the President's personal conversation with the Secretary of Interior. I believe on—

Mr. CANNON. We had an oral communication here, an oral interaction between the President and the Secretary of Interior. I heard that in the press that you said that. I wondered if that was actually an accurate quote, but that was not my question.

My question was, as you sent those letters, those e-mails saying that you needed a Presidential letter to start the process, were you doing that legalistically? Were you thinking as a lawyer or were you taking advice from other lawyers, either at CEQ or at Interior?

Ms. MCGINTY. No. I was fulfilling the President's directive to me that he wanted the process initiated to review whether a national monument pursuant to the Antiquities Act could be established in this area. Again, because of his grave concern about legislation that was pending on Capitol Hill that he—

Mr. CANNON. But you have not answered the question. Pardon me. I'm just wondering, when you authored those letters, when you said we need the—you said this several times, as I recall, we need the President to sign a letter, were you thinking then as a lawyer or were you acting on advice of other lawyers?

Ms. MCGINTY. I was acting at the direction of the President to try to fulfill his directives that he wanted this process engaged and a—

Mr. CANNON. With all due respect, Ms. McGinty, the e-mail was very clear that you were going to the President with this idea and that you wanted to go with a letter, not at his oral direction.

Ms. MCGINTY. If I recall, if I am thinking of the e-mail you're talking about, that e-mail was to the staff secretary. The function of the staff secretary in the White House is to secure the President's review of documents, often that he has requested, and to secure then his signature of those documents.

That is the e-mail that I believe you are referring to. The President requested the action.

Mr. CANNON. No, no, that is not. There are e-mails between you, I believe, and I believe it's the Interior Department and other members of your staff, not the document controller of the President. But, still, I'm wondering, did you act as a lawyer when you did that or whose advice—did you get counsel as to that issue and if so, whose counsel was it? That is, legal counsel.

Ms. MCGINTY. I was only fulfilling the President's request of me that the Interior Department engage in the analysis required under the Antiquities Act to inform his decision as to whether or not—

Mr. CANNON. And when did the President give you that direction?

Ms. MCGINTY. It was around the time that he spoke to the Secretary of Interior, so around July 4 of 1995 or 6. Six, I suppose.

Mr. CANNON. May I have an additional 5 minutes to continue this line of questioning or would you prefer that we come back?

Ms. CUBIN. Actually, Representative Cannon, we are going to have two rounds and so if you wouldn't mind coming to that next time.

Mr. CANNON. Yes, thank you.

Ms. CUBIN. And besides that, it's my turn, since Representative Pombo left, so hey.

Ms. McGinty, you made it very clear and I don't argue this point because I am not an attorney and I don't know, but that NEPA does not apply to Presidential actions.

Ms. MCGINTY. Yes, right.

Ms. CUBIN. But isn't the purpose of NEPA, in spirit, if not in the word of the law, to protect the resource? It's yes or no. I mean, it's to protect—

Ms. MCGINTY. In part, I'd say—as we've been talking about before, there is an environmental component of NEPA, but it's broader. I think, to use current buzz words, it's about sustainable development is what NEPA is about.

Ms. CUBIN. Fine, fine. OK. So now, to quote NEPA regulations, this is the quote, "Major Federal actions significantly affecting the quality of human environment are situations where the NEPA process should be triggered."

Ms. MCGINTY. Yes.

Ms. CUBIN. Now, isn't it, again, a bit disingenuous to say, well, the President doesn't have to—or NEPA doesn't have to be applied to Presidential action, when, in fact, that is what the purpose of NEPA is? Whether it's strictly spelled out in the law or not, because what the law actually says is that the lead agency should identify potential cooperating agencies.

I mean, basically, if, in fact, the letter of the law wasn't violated, isn't the spirit of the law violated in this situation? Because certainly there are enormous impacts to people by Escalante.

Ms. MCGINTY. I think—and related to Mr. Cannon's point, there are very few areas where the prerogative, through legislation, through tradition, through the Constitution, is retained specifically and exclusively by the President of the United States solely.

In almost all instances, the authority is delegated to the agencies.

Ms. CUBIN. And this is considered an emergency, is that—I mean, the timing has been brought into question, that it was done for political gain, and this was considered an emergency that, even while people were being told this is not going to happen and other folks were being loaded in buses in Colorado to drive them down to Arizona, to make this announcement—I mean, come on, Katie.

Ms. MCGINTY. Well, I would not say that this is an emergency in the sense of some of the other issues we've been talking about in terms of fires breaking out. We certainly were, and had communicated to the Congress, gravely concerned about the legislation that was moving on Capitol Hill, but it is true that the Antiquities Act relegates certain powers and prerogatives to—

Ms. CUBIN. I understand that, but that doesn't direct—but that does not answer the question that I am trying to get answered. So let's just move on.

Like the others, I would like to have it on the record that we wrote a letter to CEQ and all of the rivers within the State of Wyoming are not to be included in AHRI. Thank you.

One thing I have to say, though, is that I thought it gave me reason for pause when AHRI was sold as going to be, you know, local people are going to make the decision, even though we have a river navigator that isn't answerable to anyone except the political person who appoints him. But local people are going to be the ones to

make the decisions and yet it's Federal people who are knocked out of the process when rivers are withdrawn from consideration.

That just gave me reason for pause.

Ms. MCGINTY. Of course, if there were local opposition, that also—significance local opposition, that is one of the criterion on which an application is judged. There has to be a demonstration of strong and broad-based local support.

Ms. CUBIN. One thing that we have had a problem with in my state, as well as—during a NEPA process, as well as the Federal agencies working with the state to get the process completed in a timely fashion, we have had a horrible problem with the disagreement between Federal agencies, between the EPA and the BLM and things like that.

Do you think that the CEQ has a role in establishing a policy whereby different Federal agencies cannot get my constituents in a deadlocked, money-losing situation?

Ms. MCGINTY. Yes, and—

Ms. CUBIN. And are you working on that? I know at one time you were working to streamline the process, but then I heard that you stepped away from that. So what is the status on that?

Ms. MCGINTY. The answer to the first part of your question is absolutely yes. One of the major and, I think, not well implemented parts of NEPA is the scoping process, which process requires that all of the agencies are going to have a piece of this. Any agency is going to have an issue with regard to a specific project, be at the table and bring those issues to the fore in the initial stages of the project.

This is one of the top priorities in the overall reinvention effort that we had launched. We had—

Ms. CUBIN. But our problem was that the agencies were brought together, but two Federal agencies disagreed.

Ms. MCGINTY. Yes.

Ms. CUBIN. Which caused a long delay in any—

Ms. MCGINTY. Right. And the point of the scoping exercise is supposed to be to iron out those differences and find a plan that everybody can move forward together with.

Ms. CUBIN. Just one last observation, because since I was so strict with Mr. Cannon.

It was suggested to me, and regretfully so, that sometimes this Administration appears to promote the Leona Helmsley philosophy that laws are not for the Administration, but they're for the little people, and, you know, when I see things like Escalante and the American Heritage Rivers Initiative and the questioning that Ms. Chenoweth brought forward on what the legal role of government agencies is, it gives me cause for concern.

The Leona Helmsley philosophy ought to be the least philosophy considered by anyone in government, I think.

Mr. Pombo.

Mr. POMBO. I'll pass.

Ms. CUBIN. Ms. Chenoweth.

Ms. CHENOWETH. Madam Chairman, I will forego my next line of questioning, but I would like to submit a letter for the record from the Central Arizona Project Association, from Robert S. Lynch, Chairman of the Board.



Ms. CUBIN. Without objection.

[The information referred to may be found at end of hearing.]

Ms. CUBIN. Mr. Cannon.

Mr. CANNON. Thank you, Madam Chair. Going back to the American Heritage Rivers Initiative for just a moment. There is some question about what level of government the CEQ will accept as opting out of the program for their area.

In other words, you have certainly the Governor, I suspect, may be able to, and I'd like your response to that. But going down through, how about county commissioners or mayors or special districts within a town or political subdivision? Have you—where are we on that?

Ms. MCGINTY. We have not granted the same veto kind of authority to the full spectrum of government officials that you just mentioned. Certainly we have with Members of Congress and as this discussion illustrates, there are many such waivers we have granted.

But very much related to this, an application has to demonstrate broad-based and diverse local community support before it will be positively considered.

Mr. CANNON. If a Governor asks to opt out, would you opt out for the Governor?

Ms. MCGINTY. I can't—I am not aware of any such request that we have had. For the most part, the requests have come from Members of Congress, which we have granted.

Mr. CANNON. But you would weigh lower levels of government in your process of deciding which waivers should be done.

Ms. MCGINTY. Yes.

Mr. CANNON. Let me just ask one other question on another topic here. If you look at the picture to the your left, this is an area that I—I have tracked horses through this area. I grew up and spent a lot of my youth in my area.

One of the things I find disturbing is there is a group of environmentalists or a thought among some groups that this kind of devastation by pine bark beetles is natural and, therefore, acceptable.

I take it when you earlier said that you had talked about that with the Forest Service, that is not particularly your view, but I would like to note that for the record.

Ms. MCGINTY. Well, every specific instance, I think we need to have the scientists decide the land management—the land managers decide what is the best course. But I will say it is my experience that in almost all instances, the land managers believe that some management of the resources is necessary, if even just for the purpose of enhancing its environmental quality. That just leaving problems fester is not a workable solution.

Mr. CANNON. So you think that this is a mistake that we have made, the picture that's represented here of the Dixie National Forest is a mistake and we ought to be solving that, if we can.

Ms. MCGINTY. Well, I wouldn't want to criticize the actions taken by the land managers. I don't know what the situation has been. Certainly this is not a positive development that there is this kind of infestation, no.

Mr. CANNON. That's what I wanted to hear. Thank you. I appreciate that.

Ms. MCGINTY. But, also, there are many and varied causes. Sometimes it's lack of management. Sometimes it's overly intense management. I think we realize——

Mr. CANNON. Right. We recognize there are all kinds of cause, but ultimately, I understand you as saying that you think this kind of infestation shows that a mistake has been made and we need to do something to correct that. We're not even talking about what to do to correct it. Maybe just NEPA, maybe we do other things, but you think that this is a problem.

Ms. MCGINTY. Well, it could just be an act of nature, too. I don't want to cast blame with and blame——

Mr. CANNON. Well, it's clearly an act of nature. These are bugs that are killing the trees. That is clearly an act of nature.

Ms. MCGINTY. And I would strongly suspect that it is linked to management decisions that have been made in the past, whether——

Mr. CANNON. Clearly you could have cut down a few trees 5 years ago and solved the problem. A few hundred acres would have solved the problem and that didn't happen.

Ms. MCGINTY. That may be the case in this instance, but there are other instances where clear-cutting, for example, has greatly exacerbated these kinds of problems and given the invitation for invasive species to come into an ecosystem.

Mr. CANNON. Well, but not this kind of bark beetle, which I think we understand how it works and we know that you can contain it if you do that.

Oh, the yellow light is on. Can you tell me, in just a minute, who was at the meeting on July 4 with the President when he communicated his interests orally about the creation of a monument?

Ms. MCGINTY. The President spoke to the Secretary at a Fourth of July celebration on—I think it was the Eastern Shore of Maryland, where a Bald Eagle was released, and it was after that—I think right after that ceremony that the President and the Secretary had a conversation.

Mr. CANNON. Who initiated it, were you there?

Ms. MCGINTY. I was not there, no, sir.

Mr. CANNON. I take it then that Secretary Babbitt told you about this or was it the President?

Ms. MCGINTY. No. I had spoken to the President about it either before or after that, but certainly around that same time.

Mr. CANNON. So did the President initiate the discussion or did Secretary Babbitt?

Ms. MCGINTY. The President initiated the discussion.

Mr. CANNON. And did you initiate the discussion with the President or did he initiate the discussion with you?

Ms. MCGINTY. Well, we had been engaged in an endless number of discussions throughout the—since the inception of the 104th Congress, when legislation relevant to these lands began to move, and as you know, we had a whole series of actions that, yes, I discussed frequently with the President, veto threats, testimony against the legislation, and ultimately the establishment of the national monument, all of which were related to the same thrust that we had to, as you know, oppose the legislation that was moving.

Mr. CANNON. Which legislation in particular was that?

Ms. MCGINTY. The legislation that would have removed environmental protections from Federal lands in Utah.

Mr. CANNON. I'm sorry. What?

Ms. MCGINTY. I'm happy to provide it for you, but it was sponsored by the Utah Delegation.

Mr. CANNON. Was it the wilderness bill?

Ms. MCGINTY. I'm sorry?

Mr. CANNON. Was it the wilderness bill that Jim Hansen introduced that would have created 2.1 or 2.4 million acres of wilderness?

Ms. MCGINTY. Right. That would have reduced from——

Mr. CANNON. So you felt compelled to do in a regulatory fashion what Congress deemed not to do.

Ms. MCGINTY. Well, we were successful, I think, in opposing the legislation, but that didn't happen, of course, until the final days of the Congress, because there were still efforts in the appropriations process to deny our ability even to——

Mr. CANNON. Are you suggesting that the regulatory process is co-equal with the Congressional process?

Ms. MCGINTY. Well, regulations, of course——

Mr. CANNON. As long as you accomplish your objective.

Ms. MCGINTY. Regulations, of course, have the full force and effect of the law.

Mr. CANNON. Of course they do, but they should follow Congressional intent, don't you think?

Ms. MCGINTY. I absolutely agree with that, yes, sir.

Mr. CANNON. But that's not what you just said. You said you were protecting what Congress deemed not to protect or was considering not protecting.

Ms. MCGINTY. No. Congress did protect it, because the legislation was not passed. So the protections on those lands now remain in place. The legislation was failed.

Mr. CANNON. The protections remained in place. It was a wilderness study area. With all due respect, that's a study area, not an internal designation. Congress has not acted to designate wilderness.

Ms. MCGINTY. That's right, but Congress has acted to say that a wilderness study area is managed for wilderness purposes until Congress acts to change that designation.

Mr. CANNON. The sum of what you're saying is that you and the President designated a monument because you know better about how to designate land in Utah than the Congress does.

Ms. MCGINTY. Well, sir, the Antiquities Act is on the books, has been on the books——

Mr. CANNON. And was massively abused, of course, in this case. But was your purpose to beat Congress at our game?

Ms. MCGINTY. I didn't understand that you were pursuing a game, sir.

Mr. CANNON. This is the national game done by the founding fathers. We have that authority and you're talking about usurping that authority from Congress.

Ms. MCGINTY. No, sir, there is nothing—you have the authority to designate wilderness areas. That's right. A national monument,

of course, doesn't designate wilderness areas one way or another. And, in fact—

Mr. CANNON. It probably does eliminate wilderness areas. That's been my position for a long period of time. I think ultimately what you've done to the land is probably wrong and subjects it to injury that is unconscionable, like the bureaucratic process that doesn't work, is done to my home land down in southern Utah and I think that the approach—if you read the law, you would not have done so many acres.

That is unconscionable and I think that that will be solved elsewhere. Thank you. Mr. Chairman, I'm finished with my time, and beyond.

Mr. POMBO [PRESIDING]. Thank you.

Mr. CANNON. But I can't get over the fact that this is all a matter of oral interaction here at the Presidential level for making these kinds of decisions.

Mr. POMBO. Ms. McGinty, I did not intend on touching this subject, but since we've heard so much about it this morning, I just wanted to ask. In terms of the American Heritage Rivers Initiative, how—I'll just ask you. How can you tell Mr. Cannon that his rivers are left out just unilaterally?

Ms. MCGINTY. In designing the program, many Members of Congress requested that they have that ability and we wanted to respond positively to that and made sure that as the program was put together, that that would be an integral feature of the initiative. That if a Member of Congress wanted the rivers in his or her district opted out, vetoed, if you will, that he or she would have that right.

Mr. POMBO. I'm one of them who asked, but—and I'm not arguing with individual members having that right. But in looking at your testimony and what the functions of the CEQ are, I see nowhere in here where it gives you or the Council on Environmental Quality the authority to make decisions like that.

Ms. MCGINTY. Sir, I am obliged, pursuant to the National Environmental Policy Act, to ensure the coordination of environmental policy and what this initiative is about is ensuring that the agencies are working together in a way that, on a second thing that is called for in NEPA, that local communities begin to have a role in decisionmaking, begin to have an effective voice in decisionmaking processes.

This initiative is about effectuating that directive and its intent in NEPA.

Mr. POMBO. It just appears to me that the way this whole thing is being put together is that it's not an initiative, it's a new agency and you are the head of that agency and are making decisions for Forest Service, for the Department of Interior, for the Department of Agriculture, for the National Marine Fisheries Service.

You are now the head of all of those agencies and are making those decisions. You're not coordinating the activities of those agencies. You are now the super-agency on all environmental issues and you are the one who now has been put in the position of making those decisions.

Ms. MCGINTY. I will assume no decisionmaking responsibility for any statutory program which is a part of this initiative. For exam-

ple, I think it's the Environmental Protection Agency and the Department of Housing and Urban Development who have the authority to decide who gets a brownfields grant. We hope to have that integrated into this program, but I will not make those decisions. EPA and HUD will make——

Mr. POMBO. Let's just use your example that you just gave me of the Brownfield cite. Is there someone from EPA here that you just coordinated with when you made the decision that none of the rivers in Mr. Cannon's district are going to be included? Is there anyone from EPA here?

Ms. MCGINTY. Every one of these agencies is involved in this program and I think it's 13 different agencies cooperating, have already decided that should a Member of Congress act as Mr. Cannon has just done, to withdraw the rivers in his or her district, that they would be withdrawn. Those agencies have reached that decision as part of putting this initiative together.

Mr. POMBO. And so you are the one who has been put as the head of this new American Heritage Rivers agency.

Ms. MCGINTY. There is no agency that has been created here.

Mr. POMBO. Who is in charge of it?

Ms. MCGINTY. This is a collaborative interagency effort. There are, as I said, 13 different agencies.

Mr. POMBO. But who is in charge of it?

Ms. MCGINTY. They're all working collaboratively.

Mr. POMBO. So no one is in charge?

Ms. MCGINTY. They are reaching decisions on a consensual basis and we provide the——

Mr. POMBO. Who chairs the meetings?

Ms. MCGINTY. Sorry?

Mr. POMBO. Who chairs the meetings?

Ms. MCGINTY. There are many different agencies involved. CEQ acts as a convenor of those meetings. Some of my staff are involved in those meetings. I would say probably at every instance, someone from my office is involved in those meetings, but——

Mr. POMBO. Do they chair the meeting?

Ms. MCGINTY. They have been more collaborative than the, I think, question would suggest.

Mr. POMBO. You and I both know if you sit down in a room with 13 different agencies, you don't sit around a round table and nobody chairs the meeting.

Ms. MCGINTY. If this is helpful, the agencies involved in this will report to the President through me on what their recommendations are. They have done that throughout the process and putting the initiative together. It led to the President's execution of an Executive Order on this, and that will continue to be the process. But in terms of the decisions, it is the agencies that are reaching those decisions on how the project should be developed and implemented.

Mr. POMBO. Maybe I can ask you the question in writing and have it answered.

Ms. MCGINTY. That's fine. I'd be happy to.

Mr. POMBO. In writing.

Ms. MCGINTY. Fine.

Mr. POMBO. It's apparent that you really don't want to answer it, so maybe if we do it that way, you can have your attorneys look at it and you can answer it.

But I want to thank the panel for your testimony a great deal. I know that we kind of got off on a few other subjects during the panel, but I appreciate your testimony and thank you very much.

Mr. GERINGER. Thank you, Mr. Chairman.

Ms. MCGINTY. Thank you.

Ms. NORTON. Thank you.

Mr. POMBO. I would like to call up the second panel. Mr. Randy Allen, Mr. Michael Byrne, Mr. Dan Chu, and Ms. Lynn Scarlett. I would like to welcome the second panel up. Thank you very much. I am sure you're all aware of how the light system works. Mr. Allen, if you are prepared, you can begin.

**STATEMENT OF RANDY ALLEN, GENERAL COUNSEL, RIVER  
GAS CORPORATION, NORTHPORT, ALABAMA**

Mr. ALLEN. Thank you for the opportunity to be here. I represent River Gas Corporation, a small, independent natural gas producer, with three shareholders.

We currently operate over 500 wells in Tuscaloosa, Alabama, 114 wells near Price, Utah, and some wells in Wyoming.

Over the past 3 years, we conducted a study of every domestic coal basin. Every area showing strong potential involves Federal land. Our future is based on the premise that we will be allowed to extract natural gas in a prudent fashion from Federal lands.

We are very concerned about the costs and timing of NEPA compliance. In its current form, NEPA can either be a very useful planning tool, encouraging prudent decisionmaking, or it can be used to block even the most environmentally sound proposal.

How it is used depends solely on the Federal agents who are making key decisions throughout the EIS. This Russian Roulette is crushing small companies and driving large ones overseas.

River Gas purchased 128,000 acres of leases in central Utah. Seventy six thousand acres of those were on BLM land. When we made the investment, we planned on a certain time-frame within which we would realize a return. In April 1994, an EIS was initiated for our proposal to develop our leases. We agreed to pay for it.

The EIS originally was scheduled to be completed in 13 months, before June 1st of 1995, within a \$200,000 budget. It was completed in May 1997, almost 2 years late. We paid \$1.3 million for the effort, \$1.1 million over budget.

Some have said that our experience is the Poster Child for NEPA reform. Whether it is or not, it's an example of how the current system allows things to go terribly wrong and it demonstrates how much power is wielded by field level BLM employees without oversight.

Early in the EIS, a small group of BLM employees clearly indicated that they were personally opposed to our project. Over the course of the EIS, the group manipulated the system to delay the process. It forced the contractor to back up and repeat work and forced us to spend a lot of money.

They were hoping we would just go away, but we couldn't. We had invested our entire future in the leases in Utah and our wells on state and private land were prolific, indicating vast untapped reserves under our Federal leases.

For example, in 1997, we paid the State of Utah \$2.3 million in royalty. Our EIS was completed over 9 months ago, yet we still have not received a single permit to drill on Federal land. That was as of yesterday. We could have received some today.

The small same group who caused the problems during the EIS are working on our permits. This being said, most BLM employees are good to work with. Most of the people are good, they're honest, they have integrity, they're professional, but a small group involved in the process can cause big problems.

NEPA also is fundamentally good. I think NEPA has done a lot to promote prudent decisionmaking in the process. I think the industry is better off for it. I think we would be concerned if we were talking broad-ranging sweeping changes to the law, but in certain instances, it can get out of control.

We need strong oversight during the process. We need to demand that agencies get control of the process early on and we need to develop a process allowing project proponents to raise concerns during the process.

We need to set maximum time limits on the EIS process; not only on the entire EIS, but also on critical key points during the process. We need followup analysis. Many EIS's are made based on assumptions of previous EIS's on how different activities will impact the environment. No followup is done on these assumptions. So the same effects could be perpetuating themselves over time. Followup analysis needs to be done.

Also, the employees inside the BLM, for the most part, are overworked, they're understaffed, and they're struggling with a very complex set of rules and regulations.

I would request that in the budget-making process, that there be at least consideration given to dedicating money to resolving some of these issues in the field and dedicating employees for that purpose.

Thank you for the opportunity to be here today. I've wanted to tell our story for some time. I hope it helps.

[The prepared statement of Randy Allen may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Byrne.

**STATEMENT OF MICHAEL J. BYRNE, VICE CHAIRMAN OF THE  
FEDERAL LANDS COMMITTEE, NATIONAL CATTLEMEN'S  
BEEF ASSOCIATION, WASHINGTON, DC**

Mr. BYRNE. Thank you, Mr. Chairman. I am Michael Byrne, Vice Chairman of the National Cattlemen's Beef Association, Federal Lands Committee, and Director of the California Public Lands Council. My brother and I ranch in a family partnership in northern California and southern Oregon on a fourth-generation cattle ranch.

Thank you for the opportunity to testify today. I would like to submit written testimony at this time.

I wish to begin by saying that I have no doubt that the intentions behind NEPA were good. The vision encompassed in NEPA is that all Federal agencies work together to achieve, in quotes, "productive harmony among our environment, economic and social objectives, and to give a voice to the various interests represented in the decisionmaking process."

It is my belief that NEPA has fallen far short of these goals in many respects. In my business, NEPA analysis is considered a broken process because of the endless delays caused by lawsuits and administrative appeals and the endless new interpretation of what is needed to fulfill NEPA's mandates.

Implementation of NEPA with respect to ranching operations has created a lengthy regulatory maze, imposing a heavy economic burden on the ranching industry.

In my opinion, the NEPA process has become a redundant exercise in document production, resulting in limited, on-the-ground implementation of resource management, which is robbing the public of its intended benefits.

More importantly, the way NEPA is currently being administered is subverting the whole purpose of the Act. In the original Congressional declaration of intent for NEPA, Congress stated that it is the policy of the Federal Government to create and maintain conditions under which man, and I underscore man, and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of America.

Instead, NEPA has evolved from a national policy designed to protect the integrity of the environment into an unbridled regulatory apparatus which subordinates the economic needs of the community to agency preferences for resource preservation. This situation causes uncertainty and apprehension in the ranching community.

The livestock industry's experience with the NEPA process suggests it is time for Congress to clarify its original intent to the agencies and to the courts so that NEPA can be applied as it was supposed to be, instead of today's morass of delay and bureaucratic red tape.

Currently, qualified range managers are tied up in the office with paperwork and endless coordination meetings with other agencies instead of being on the ground managing the resource.

I am not here to argue whether the NEPA analysis should or should not apply to specific grazing decisions or whether the process is biased toward uses other than grazing. The fact is, most ranchers are already good stewards of the land and are dedicated to working within the regulatory constraints of the Act to demonstrate their good management to the American public.

The Forest Service has estimated the cost of managing the forests and completing the NEPA work, as currently interpreted, to be more than double what the current range management's budget is. That means they want \$2 for every one to comply with what they interpret Congress requiring them to do.

Instead of doubling the agency's budget to fund a broken process, let's fix the process. The public's right to participate in decisions about the use of its public lands can be accomplished without spending an obscene amount of money.



NEPA has turned into a money black hole for the land management agencies. We are funding a process. The process has taken control. We are more concerned about complying with a process than we are about managing the resource or making sure the American public's concerns are addressed.

The procedural mechanism of NEPA is in dire need of overhaul. The following is a list of some of the positive suggestions for change. Overlap of regulatory statutes should be eliminated and consistent and coordination with the application of the Act among agencies should be mandated.

Duplication of regulatory efforts involving multiple agencies leads to unpredictability and unnecessary costs and delays. The process should be amended to eliminate multiple analysis of the same allotment. Under the present system, it is not uncommon for a rancher to spend over 2 years working with the Forest Service or the BLM toward the completion of an environmental assessment, only to have the Fish and Wildlife come along and change everything with a biological opinion, effectively changing the completed EA.

Agencies should coordinate efforts and the Act should be applied consistently. Under the present system, each Federal agency interprets and applies NEPA differently. For example, one agency can build a fence almost immediately, but another agency may have to wait up to 2 years to complete what it perceives to be the process.

Agencies should have the authority to categorically exclude land management plans and grazing authorization from NEPA. Agencies should also be required to work cooperatively from one set of data, incorporating all the science necessary to meet the requirements of the applicable regulatory statutes.

The public participation requirement extends the public involvement invitation to anyone interested in any livestock management action occurring on Federal lands, including small actions such as fence-building or maintaining range improvements.

This broad-scale public participation ties the hands of ranchers and range managers attempting to make timely stewardship decisions. The public involvement requirement should be reevaluated to preclude the interested public from interfering with the minor decisions at the local level, where the agency land managers have been trained to make these types of decisions.

The number of frivolous NEPA appeals is increasing, despite the opportunity for increased public participation in the early stage of allotment planning process. The result of more appeals is increased delay, expense, and exhaustive record production that have no positive effects on range management.

For example, under the current grazing regulations, any member of the interested public may become involved in the decisionmaking process for any action relating to the management of livestock, including activities such as issuing, renewing and modifying permits or leases.

In a recent letter from Director Shea to Senator Larry Craig, on appeals, he has estimated that the cost went from \$52,000 in 1994 to over \$350,000 in 1997 for just one regional office. This is unconscionable, because these appeals have mostly been denied because they are without merit.

The 1995 Rescissions Act required the Forest Service to come up with a schedule for completing NEPA. The Forest Service estimates vary, but they are only at 40 to 70 percent complete of what they estimated, and, as has been testified to earlier today, the cost has been enormous, with the production being very slow.

The bottom line is NEPA is a procedural law designed to ensure that actions of the Federal agencies are balanced between the needs of man and the environment by allowing everyone to voice their concerns in the decisionmaking process. Currently, we are caught up in the process that we are forgetting about the bigger picture, which is the public lands are being held in trust by the government for the benefit of all Americans.

Right now, the American public and the resources are not being well served by the NEPA process.

This concludes my testimony and thank you very much. I will be happy to answer any questions.

[The prepared statement of Michael J. Byrne may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Chu.

**STATEMENT OF DAN CHU, EXECUTIVE DIRECTOR, WYOMING WILDLIFE FEDERATION, CHEYENNE, WYOMING**

Mr. CHU. Good afternoon, Mr. Chairman and members of the House Resource Committee. My name is Dan Chu and I am the Executive Director for the Wyoming Wildlife Federation.

We are a non-profit conservation organization, composed of over 3500 members, who are united by deep commitment to the protection to wildlife habitat, the perpetuation of quality hunting and fishing, and the protection of their right to use and enjoy public lands.

Today I would like to provide our perspective on the function and effectiveness of the National Environmental Policy Act.

NEPA was established in 1970 to establish the Council of Environmental Quality and to guide Federal agencies in their efforts to manage for sustainable development and to allow the public to be involved in the management of their lands and resources.

Our members directly benefit from NEPA because it provides a forum for local people and local interests to be considered in Federal actions on public land.

We educate and mobilize citizens to be involved in these decisions that affect the public land throughout Wyoming. We view NEPA as providing Federal agencies a formal process for responding to the public and determining if an action is truly in the public's interest.

We believe that the purpose of NEPA is to establish the policy that all Federal agencies must, No. 1, be responsible to future generations; No. 2, provide environmental equity for all Americans; No. 3, allow for the beneficial use of the environment without undue degradation; four, encourage historical, cultural and biological diversity, as well as individual liberty; five, promote widespread prosperity for all Americans; six, manage for the conservation and prudent use of our natural resources; and, seven, consider and incorporate public comments and interests.

NEPA does not have decisionmaking authority. Rather, its function is to provide a framework for disclosure and sound planning.

NEPA requires that Federal agencies provide the public with full and adequate disclosure of impacts and effects of development. Such effects include ecological, aesthetic, historic, cultural, economic or health.

To determine the true impacts of development, an adequate cumulative impact analysis must be conducted. Ultimately, a good cumulative impacts analysis can ensure the orderly development of our public natural resources under a multiple use mandate.

Although we believe that NEPA is an example of great foresight and responsibility from Congress in 1970, we also feel that the implementation of this Act can be improved and streamlined. In fact, the topic of improving and streamlining the implementation of NEPA was a major topic of discussion for the Green River Basin Advisory Committee, on which I served as a member in 1996.

In response to a growing number of concerns and appeals surrounding the cumulative impacts on proposed oil and gas development on Federal public lands in Wyoming and Colorado, both oil and gas companies and environmental organizations asked the Secretary of the Interior to initiate a formal process to help resolve conflicts.

Secretary Babbitt formed the Green River Basin Advisory Committee, which I will refer to as GRBAC, in February 1996. The GRBAC was given a one-year charter; to ensure the reasonable development of natural gas and oil, while protecting environmental and other resource values on public land in southwest Wyoming and northwest Colorado.

Secretary Babbitt, in cooperation with the states, selected 16 members from the oil and gas industry, conservation groups, state game and fish agencies, local and state government, and any recommendations forwarded to the Secretary from the GRBAC received the wholehearted support of every single member on that committee.

One of the issues we agreed to discuss was the use of NEPA. After much discussion, we reached consensus on some recommendations we felt could improve the implementation of NEPA and the process of oil and gas development on public lands.

I would like to briefly point out some of the recommendations. For more detail, I refer you to the GRBAC's final report to the Secretary of the Interior.

One of the most common issues of concern we discussed was the lack of interagency coordination in the NEPA process. We recommended, quote, "improving coordination and communication among project proponents, affected agencies, and stakeholders, to reduce adverse comments and time required."

Specifically, we all saw a need for Federal agencies to improve interagency coordination prior to and during the NEPA process. We all felt that there have been too many instances where one particular development project had resulted in two or more NEPA documents initiated by different Federal agencies.

Such a lack of coordination resulted in unnecessary delays and inadequate cumulative impact analysis.

One complaint we heard from industry is that the NEPA process results in significant delays. Many of these delays result from a lack of accurate field data, detailing the status of existing wildlife and plant communities. We also recognize that industry and environmentalists alike are frustrated with the incompatibility of various Federal agency data bases, often precluding the share of key biological data.

Another GRBAC recommendation addressed how to improve the format and content of the NEPA document, while reducing its size. "Eliminate duplication in data requirements, as well consolidating and accessing existing data bases."

To this end, we recommend that Congress provide additional funding to Federal agencies for the purpose of consolidating various data bases to provide accurate and comprehensive biological data.

Another recommendation was "impact analysis should be based on scientific and realistic impact assessments, not speculation." This recommendation states that a common need of industry, environmentalists, and management agencies is that of having reliable and complete databases. Whereas industry strongly believes that it is not their responsibility to collect baseline data, Federal agencies have a legal and moral responsibility to the public to conduct a cumulative effects analysis and minimize impacts of the proposed development on other users.

We believe the fundamental problem once again resides with inadequate funding of data collection. For this reason, we support the Teaming with Wildlife Initiative and believe that it could bring sorely needed funds to state game and fish agencies to conduct those baseline data studies.

In conclusion, we applaud the great foresight and wisdom of Congress when they established the National Environmental Policy Act in 1970. Consolidating Federal agency data bases, improving inter-agency coordination, investing and filling crucial biological and cultural data gaps, and facilitating early communication between all resource users can enhance the implementation of NEPA.

Thank you for this opportunity to comment.

[The prepared statement of Dan Chu may be found at end of hearing.]

Mr. POMBO. Thank you. Ms. Scarlett.

#### **STATEMENT OF LYNN SCARLETT, REASON PUBLIC POLICY INSTITUTE, LOS ANGELES, CALIFORNIA**

Ms. SCARLETT. Yes. I'd like to thank the Chair for convening the hearing and thank Mr. Pombo for his patience and perseverance and the committee members for their attention.

As Executive Director of the Reason Public Policy Institute, a Los Angeles-based think tank, I am not here as a practitioner involved in the NEPA process, but rather as an analyst who has reviewed NEPA and other environmental statutes and practice.

Let me offer a few brief comments, first, on NEPA goals and practice and then perhaps on some propositions for change. NEPA is unique, in my mind, among environmental statutes in several ways.

First, as several folks have pointed out, it explicitly sets forth a goal of balancing environmental, economic and social values, not a dominance of one over the other.

Second, it offers an opportunity for a big picture focus on environmental impacts rather than a single impact focus. Third, it is not prescriptive, but rather procedural and somewhat general.

As with others, I think that NEPA was laudable in its intent, but it has not always fulfilled its promise. Specifically, sometimes we've had unintended consequences and, as we have heard much today, many procedural inefficiencies and some ineffectiveness, and I want to mention three in particular, which repeat some of what other folks have said.

First, sometimes balance is absent. NEPA has been used rather as a tool to delay and stop rather than to improve projects in some instances, and this has been more evident in some areas, particularly forestry, highways and mining, than in others.

On the other hand, some agencies only reluctantly comply and don't integrate NEPA into their plans, the result being that there is a failure to consider alternatives and a failure to make perhaps needed environmental improvements in some cases.

Moreover, there is also little meaningful state, local and citizen participation, as we've sometimes heard.

The third problem, again, to repeat, is that it has been time-consuming and costly, sometimes with no clear consequence resulting. Costs range from a few thousand dollars to, in one instance that I tracked, as much as \$40 million for one EIS. Sometimes the process takes up to 6 years or more. Indeed, sometimes even closer to a decade. The cost on occasion is over 10 percent of total project costs, although usually it is much smaller than that.

Documents are long and inaccessible. One study that I looked at showed that the language in these documents is geared to the typical college graduate or a person with a graduate degree, rather than the general public.

CEQ is aware of many of these problems, as are agencies, and they have attempted to reduce cost inefficiencies and improve public participation through some of the reinvention efforts that we have heard. Some of these efforts, I want to point out, have actually been successful. The DOE, Department of Energy, set up specific goals for reducing its median time for EIS's and for environmental assessments.

It tracks those costs and, more importantly, actually discloses those to the public. The consequence is that the DOE has managed to reduce its average time for EIS's from about 3 years down to less than 20 months.

CEQ, as noted earlier, has also embarked on various reinventions, including the use of alternative dispute resolution, as Ms. McGinty suggested.

Some of these reinvention efforts have been laudable and folks point to them as a reason for not making any changes. I would suggest that that conclusion is perhaps overly optimistic and there may be a role for Congress to rethink some of NEPA.

While some agency reinventions have been successful, others are less so. For example, the Federal Highway Administration, despite streamlining, still has EIS processes that take many, many years.

There is a lack of up front state and local participation, as we have heard repeatedly; a lack of interagency coordination and cooperation, despite reinvention efforts.

The Forest Service often engages in costly over-evaluation in order to avoid litigation for fear that perhaps it hasn't covered all its bases.

I want to put forth several options to consider, but first restate five problems and summarize them.

One, there are no clear requirements in the statute for up front state, local and citizen participation or for the states to play a role as joint lead agency. Two, there is no mechanism to ensure coordination among agencies. Three, there are no clear requirements to report costs, length of time to complete EAs and environmental impact statements. Four, there exist substantial continued disputes over the scope of evaluations; and, five, inadequate attention to substance.

I see my time is out, but I will just summarize very briefly several recommendations.

One, I think with Ms. Norton, Congress may wish to consider establishing clear conditions and requirements for coordination of agencies and involvement of states and local governments.

Second, again, with Ms. Norton, I agree that Congress may wish to establish conditions that would trigger mediation and conflict resolution. That now occurs, but only in a serendipity and not reliable fashion.

Third, Congress may wish to consider clear requirements for NEPA costs, timing and results disclosure. That is very uneven among agencies at this point and what gets reported gets done. When you have those specific time lines that you report, it has a tendency to create incentives inside the agency to get things done.

Next, Congress may wish to clarify and set bounds on the concept of significance and, finally, Congress may wish to establish basic consistency requirements, because the reinvention efforts we've seen to date have been uneven.

In conclusion, fixing NEPA will not fix many of the problems with how agencies currently try to balance their multiple missions, including environmental protections, that they face, because some of the problems are embodied in other statutes.

Nonetheless, there is room for NEPA improvement in a way that will enhance environmental results, public participation, and reduce costs.

Thank you.

[The prepared statement of Lynn Scarlett may be found at end of hearing.]

Mr. POMBO. Thank you. Ms. Scarlett, you stated in your testimony that you didn't believe that the reinventions have solved all of NEPA's problems and you've come up with a number of suggestions for changes to the process.

One of the things that we've spent a great deal of time on, and it kind of concerns me a little bit, is we talk a lot about the process of NEPA and how we get through the process, but I don't believe that there's a lot of effort being put forth to does this really do anything for the environment.

I mean, we spend a lot of time on the bureaucracy of it and whether or not the bureaucracy is working, but is it doing anything for the environment by having this process in place.

Do you have an opinion on that?

Ms. SCARLETT. I think you've pointed to an oft reported problem with NEPA. It is a very much process-focused statute. One of the things that I suggest might be useful to do is in addition to reporting the costs and the time-frame, I also suggest that it might be useful to actually require the reporting of results.

That is not now done on a systematic basis and, again, that is a process, that is requiring reporting of results, but it has a way of changing the internal incentives that agencies face, making them more conscious that what this is all about, after all, is not simply producing a pile of paper, but actually achieving some end result that in some way improves the particular project that they were focused upon by incorporating environmental considerations, social and economic.

Mr. POMBO. Most of the complaints that I have received, that my office has received over the NEPA process have not been centered around whether or not they were doing any environmental good. Most of the complaints that I have received have been over just the very process of doing it.

I know I've had the opportunity to speak to Mr. Byrne on several occasions before and I know that you've gone through—what is it—a 7-year process with NEPA?

Mr. BYRNE. Yes.

Mr. POMBO. What grand development were you undertaking that required a 7-year process? Was it a major development that you were projecting?

Mr. BYRNE. We were trying to maintain a continuing, ongoing activity which had over a 100-year history, with substantially no changes.

Mr. POMBO. What was that activity?

Mr. BYRNE. Grazing cattle on public land.

Mr. POMBO. So you were trying to get a permit to graze cattle on public land, a process that had been occurring for 100 years, and this has taken 7 years to get a permit.

Mr. BYRNE. We're trying to get our permit renewed because the courts came out and redefined permit renewal as the major Federal action, not really the grazing. We were not trying to do any large activity or project at all, except for what had been occurring there for 100 years. Except the paperwork part needed to be done again.

Mr. POMBO. So you've gone through 7 years, a 7-year process to have your grazing permit renewed.

Mr. BYRNE. Correct. Plus, everything and anything out there was analyzed in the process. We are unfortunate. We used to believe we were fortunate to have live water and that allows us to have habitat and potential habitat for threatened and endangered fish and plants, et cetera. We also have wild horses, for which we had plans and developed things, but this analysis put them all together in one document.

Mr. POMBO. In your experience with this, has it changed your compliance with environmental laws? Were you not obeying any environmental laws before you began this 7-year process?

Mr. BYRNE. I don't believe that we are any more in compliance with environmental laws as they were interpreted then and are interpreted now. What we are doing mostly is preventative type things, such as keeping the cows out of the riparian area so that they will not have an adverse effect, because the penalties are so severe that if it did happen to take a fish by some act, that it would preclude you ever doing it.

Mr. POMBO. You state in your prepared testimony that we are funding a process, the process has taken control. Is it your opinion that if there was a—for lack of a better term—a different process that we went through, that this could have been done on a much shorter basis and at a lot cheaper cost?

Mr. BYRNE. Yes. I submit that when you're analyzing an activity such as grazing that's gone on in the same area at the same or less intensity than it has in the past, that it is a gross misappropriation of human and financial assets to undertake this type of analysis.

If there was a substantial change, such as a big earth moving event or a large Department of Defense installation or something like that, I would concur that you need to do a big analysis, but to spend this amount of time and money on an activity that has a 100-year history, to me, is fairly ludicrous.

Mr. POMBO. Mr. Allen, it's my understanding, from reading your testimony, you were attempting to develop a number of gas and oil wells.

Mr. ALLEN. Only natural gas. We're a methane company.

Mr. POMBO. Natural gas wells.

Mr. ALLEN. Yes.

Mr. POMBO. Did this project that you proposed involve a very large area?

Mr. ALLEN. The overall area of the EIS study area was about 300 square miles. We had 128,000 acres under lease. That was about two-thirds of the 300 square mile area. We had not leased the entire 300-square-mile block, but we originally proposed drilling 1,000 wells within that area. Our final proposed action was 601 wells inside that area.

The wells would be spaced on 160-acre spacing, so that would be four wells for government section, four wells a square mile. Each well pad would require about one acre. So we would have four acres of well pad disturbance for each 640 acres of land.

Mr. POMBO. And there was an estimated 600?

Mr. ALLEN. 601 wells were our final proposal, yes. We have drilled 114 wells to date that are currently producing. We have not drilled a single well on Federal land. We are producing from land owned by the State of Utah and by private individuals.

Mr. POMBO. So your entire development would have covered approximately 2,400 acres out of 128,000?

Mr. ALLEN. I'd have to double-check the math.

Mr. POMBO. It's 600 times—

Mr. ALLEN. Each—

Mr. POMBO. No. Actually, it's less than that. Six hundred wells and they're an acre a well, so it's 600.

Mr. ALLEN. Plus some acreage to put in roads to the wells. So a little bit more than that, yes.



Mr. POMBO. How many years have you gone through this process?

Mr. ALLEN. We were notified by BLM in February 1994 that we needed to get through the EIS process before they could allow us to develop any wells. So we initiated it shortly thereafter. Our first meeting was in April 1994. The ROD was signed in May 1997, about 9 months ago, and we have not received a permit yet to drill a well.

Mr. POMBO. So it's been approximately 4 years.

Mr. ALLEN. Yes. A few weeks short of that, yes.

Mr. POMBO. Ms. Scarlett, in your understanding of NEPA, with Mr. Byrne's case, do you think that the original authors of the legislation intended on this being a major 7-year event when someone went to renew a grazing permit?

Ms. SCARLETT. It's hard to get into the minds of people in the past, but my own sense is that NEPA is increasingly being applied to very trivial instances. There is another similar example where when the Forest Service had gone through an EIS process with one contractor, that contractor pulled out and was replaced. There was no change in the project whatsoever, but they were then requiring that new contractor to again go through the EIS process all over.

I don't think that was what was intended in the original legislation. And that's one reason, by the way, that I would recommend Congress considering perhaps better defining what significant is.

Mr. POMBO. So that would be one of the recommended changes, for Congress to be a little bit more specific about when it intends this Act to kick in.

Ms. SCARLETT. That's correct.

Mr. POMBO. Mr. Chu, just briefly, what everybody states and everybody that testifies before the Committee, without exception, always says that they are interested in protecting the environment, whether it's the Cattlemen that's sitting next to you or whoever it is. They all come in and say that they have no ill will toward the environment, they want to abide by all the laws, they want to protect our fish and wildlife, our clean air and clean water.

Do you believe that that's possible for us to do that without going through a 7-year process to renew a grazing permit?

Mr. CHU. I think so. And I don't know the particulars of why it took 7 years, but I don't know—

Mr. POMBO. They're in Mr. Byrne's testimony. You can read that after the hearing.

Mr. CHU. Yes, I think I will. But if part of that 7-year process was involved in collecting data or bringing together various laws or statutes, I don't know, but I guess the bottom line for us is that that those are public lands, that there are other public resource users out there.

We understand that his livelihood depends on that allotment. But we just want to be ensured that those lands are going to be adequately managed by the permittee.

I would suggest that if he had a very good record of management and had a good record of riparian protections and that sort of thing, then that 7 years could have been excessive.

Mr. POMBO. Do you understand that the more people like Mr. Byrne that come in with testimony like he has or Mr. Allen with

testimony like he has, that the more people that do that, the more pressure there is on Congress to change these laws? And that with your goal and with the goal of the other panel members to protect the environment, that the pressure, political pressure begins to build and a lot of these laws will lose some of their luster by doing that?

Mr. CHU. Yes. That's certainly one consequence. One of the things that we've tried to do help along the NEPA process is we've been working on various land exchange proposals, where BLM land and private land would be exchanged, and we have sat down with the land owner, the proponent, and other interest groups prior to scoping and tried to hammer out a land exchange proposal that we can all live with before we take that to the BLM, and we believe that that will greatly expedite the process through NEPA because what's going to happen is you're going to have a lot less controversy, a lot less public acrimony over that particular land exchange, because we've hopefully dealt with most of the time bombs before we've even brought it in front of the BLM.

That is one suggestion I would have. One of the programs that we have in our state is what's called coordinated resource management and it's a voluntary consensus effort, where the land owner or the permittee gets together with other interest groups and talks about wildlife and livestock management on that particular allotment, and try and come to consensus.

And so we strongly support that kind of process, as well.

Mr. POMBO. So you don't suggest that that process takes 7 years.

I want to thank the panel for your testimony. We have a vote on the floor, so I am going to temporarily recess the Committee. This panel will be excused and when I return, the final panel will have their chance to testify.

[Recess.]

Mr. POMBO. We're going to call the hearing back to order. I would like to welcome the third panel back. First off, I would like to apologize to you for the delay. Unfortunately, we don't control the floor schedule, so we have to kind of do this the best we can. But I appreciate you sticking with us.

Mr. Leftwich, if you are prepared, you may begin.

**STATEMENT OF TIM J. LEFTWICH, SENIOR ENVIRONMENTAL SCIENTIST, PRINCIPAL, GL ENVIRONMENTAL, INC., RIO RANCHO, NEW MEXICO**

Mr. LEFTWICH. Thank you, Mr. Chairman. I appreciate the opportunity to present testimony and appreciate your endurance here today and hanging with us.

I am speaking on behalf of the National Mining Association. It's the voice and single representative of one of America's great basic industries.

It's hard for me to say something that hasn't been already alluded to today, but I will attempt to make a couple of points about NEPA and the involvement of various agencies and the interaction of those agencies with NEPA.

First of all, I'd call your attention to the display, to my left and to your right. This is a flow chart or a gant chart showing task and time lines associated with getting through an EIS process. We did

this in the throes of four EIS's that were ongoing simultaneously in an attempt to get control of the process and understand the process.

We've heard a lot of talk today about issues associated with the process and I guess I'm going to talk in a little more detail about that.

First of all, as to time constraints and to time limits, this particular document details about a 36- to 48-month time-frame for an EIS. Some have gone sooner than that, others about 4 years.

Another issue that's been alluded to during the testimony today is the costs. Again, as most of us know, the longer the time, the more the costs. In these particular examples, the costs have ranged from one-and-a-half to six million dollars to complete an environmental impact statement for mining activities in the State of Nevada.

There is a study that was recently conducted by Dave Delcor that I would like to introduce for the record on the mining industry issues associated with NEPA, and I think that's illustrative of some of the points that I'm going to try to make today.

Mr. POMBO. Without objection.

Mr. LEFTWICH. One key issue that is not so much administrative or regulatory-driven is the role of EPA in NEPA, and that would take some statutory tinkering to fix. That problem that we have encountered is that EPA has a mandate to review and comment on every EIS that's prepared and that oversight tends to act as an 800-pound gorilla in the closet that the other agencies try to over-kill in terms of baseline data collection and the process that's detailed to the left.

I'm not sure what the solution to that is. One suggestion is to have EPA involved early in the process instead of coming in at the eleventh hour; so that during scoping, if they are a party at the table, since ultimately someone from that agency has to give final approval of the document.

Another issue that we found particularly troublesome is lead agency and who is the lead agency as opposed to cooperating and coordinating that activity. It seems that there is a reluctance on the part of the lead agency to take responsibility for the process. We submit that it's important to agree on a schedule, it's important to agree on what the process really includes, and whether all of the issues that may come before the lead agency really need to be addressed.

We think that can be done in scoping and also agree on at least taking a stab at a budget, because we find both schedules and budgets seem to be open-ended with the lead agencies.

Another question that has, I think, caused confusion is when NEPA is actually triggered. There is an attempt to get agency involvement early on in the process so that NEPA can be formally triggered and at least start going through the process, as we know it. There is reluctance, however, on the part of many applicants or proponents to trigger NEPA until all the baseline work and all of the data has been collected, and then that gets into a circular pattern of problems with timing.

If someone could flip the other chart over. In going through this, we have identified four or five specific areas that the NEPA process

gets bogged down, and that's detailed in yellow. Obviously, you can't read those from that distance, but I think that the point of this is that a systematic approach to looking at the implementation of NEPA identifies where problems occur, where bottlenecks occur, and where the process just starts going in a loop, and resulting in long time-frames and additional costs.

We think it's important for lead agencies to understand their role, to take the responsibility for guiding the process, to adhere to a schedule and also a budget. Hopefully, both of those are negotiated at the beginning of the process.

Public participation certainly is a key part of NEPA and we feel like should be coordinated by the lead agency in the very beginning to identify issues as opposed to issues being interjected into the process in the eleventh hour. The ultimate result of that is delay and additional costs for things that potentially could have been identified in the very beginning of the process.

That concludes my testimony. I have a more lengthy written testimony that you have and also a smaller version of what we lovingly refer to as the Dead Sea scrolls there, to try to identify what we think the process entails.

[The prepared statement of Tim J. Leftwich may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Loesel.

#### **STATEMENT OF JIM LOESEL, ROANOKE, VIRGINIA**

Mr. LOESEL. Thank you, Mr. Chairman. My name is Jim Loesel. I'm the Secretary of the Citizens Task Force on National Forest Management. We are a conservation group in western Virginia that has interacted with the Jefferson and the George Washington National Forests for more than 15 years. We comment extensively on projects that are proposed in both of those national forests.

Before I was the Secretary of the Citizens Task Force on National Forest Management, I commented on Forest Service projects for a number of other local groups. I'm one of those people who has been in the trenches interacting with an agency through NEPA.

At one time, I was a Professor of Political Science at Washington and Lee University. I still enjoy talking with students. I talk to students at an international school every year. They are amazed that Americans have a law like NEPA that allows citizens to interact with government agencies. We are not only allowed to give them our opinion but that opinion is quite often taken very seriously and it helps shape the eventual decision.

Students from Latin America, Asia, and Africa tell me "If we tried something like that, we would be put in jail. There are colleagues of ours that have been put in jail for doing exactly what it is that you do and have an effect on the outcome of how your government operates."

It's given me pause to think from time to time how effective NEPA is as a manifestation of democracy. It's important. When we take a look at the big picture, we see all kinds of things that NEPA does. I've tried to outline some of these in my testimony. In America, NEPA brings the public into contact with the agencies, whereas agencies in other parts of the world don't want to have contacts with their citizens to talk about resource management. We provide

information to the agency and we are able to bring up issues which the agency would otherwise have missed. There is a function in broadening the issues put before the agency. We help improve the quality of the environmental analysis through our participation. The bottom line is that the quality of the decisions are improved through our participation.

I have people from the Forest Service that tell me repeatedly "You and people like you make a difference. Thank you. We don't say that very often because quite often you make life for us uncomfortable or you force us to do things that we wouldn't have done otherwise. But off the record, let's say thank you for what it is that you and people like you do, because, in the long run, it makes a significant difference."

There is, of course, always room for improvement in the implementation of NEPA. I have made several suggestions for improvements in my written testimony. For example, I think there is a tendency for the Forest Service to use NEPA to look at more and more discreet, small projects as a result the projects tend to be fragmented, rather than a "big-picture" look for an area. It has become almost impossible to do larger area analysis through NEPA.

On the Jefferson National Forest, we had Opportunity Area Analysis, which tended to integrate projects over a landscape or watershed area, over a 5–10 year period of time. There was great enthusiasm for this kind of process on the part of agency people, as well as members of the public, because it helped us focus on an area and all of the projects to be implemented over a longer period of time in that area.

If you have a hundred projects spread all over the forest, you can't focus. You don't see the interrelationship among projects. So I would like to see changes that would allow an appropriate NEPA analysis at an intermediate level. It worked in the past and should work again in the future.

Thank you. I will be glad to answer any questions.

[The prepared statement of Jim Loesel may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Caldwell.

**STATEMENT OF LYNTON K. CALDWELL, PROFESSOR OF PUBLIC AND ENVIRONMENTAL AFFAIRS, INDIANA UNIVERSITY, BLOOMINGTON, INDIANA**

Mr. CALDWELL. Mr. Chairman, before offering my testimony, may I briefly state my qualifications for addressing this topic. Since 1962, author of numerous books and articles on the subject, and in 1968–69, consultant to the Senate Committee on Interior and Insular Affairs on legislation sponsored by Committee Chairman Henry M. Jackson.

I was principal author of a 1968 Senate report on a national policy for the environment and introduced the concept of an environmental impact statement to make environmental policy operational. This was not an impromptu addition to Senate Bill 1075. It had been under consideration for at least a year before its formal introduction.

We sought the most effective way to make the declaration in NEPA operational.

May I offer three points for consideration by the Committee. One, as its name indicates, NEPA is a declaration of policy. Two, its procedures are intended to achieve its policy objectives. NEPA is not essentially a procedural statute. Three, complaints against NEPA are more properly directed toward misconstrued and insufficient support in the Congress, the White House and the courts, than to the Act itself.

Beginning now with point one. NEPA declares a broad national policy for the environment. Specific goals and principles enumerated in Section 101 are intended to reflect basic and enduring values of Americans.

NEPA has been emulated in nearly half of our states and by more than 80 nations abroad.

Point two. Contrary to judicial misconstruction, the application of NEPA is not limited to pro forma procedures. The Congressional Record and public statements by Congressman Dingell and Senator Jackson clearly indicate that procedural requirements under Section 102 were intended to force agency compliance with the principles and priorities declared as national policy.

In addition, the Act sought to correct abuses of administrative action by requiring disclosure of agency plans and projects to all Federal agencies whose missions would be affected and to state and local governments and the general public that would bear the consequences of agency action.

Procedures mandated under Section 102, notably impact assessment, apply directly only to Federal agencies and are not comparable to the regulations administered by EPA.

Point three. Criticism of NEPA is more properly directed toward lack of commitment in the Congress, the White House, and some agencies, and the courts, than to the Act itself or to its oversight by the Council on Environmental Quality. The CEQ has been consistently under-funded and understaffed, unable to perform important functions which the Act requires.

In summary, complaints that the so-called NEPA process runs up costs and delays important projects are not fairly attributable to the Act itself. Misuses of the impact statement procedure have occurred, sometimes because of agency misallocation of planning costs; that is to say, pushing actual costs of a project on the impact statement requirement.

For projects that conflict with Congressional intent, declared in NEPA, delays and costs required to ascertain a full accounting of unintended consequences may be justifiable. Congress has the power to reaffirm and reinforce this important national commitment. The culmination of 10 years of inquiry and deliberations by successive Congresses, environment may not be the salient issue of the moment, but our most reliable opinion analysts find it to be a core and latent concern of the American people.

The Congress would be ill advised to act on the assumption that the public is indifferent to the values and principles that NEPA represents.

Thank you.

[The prepared statement of Lynton K. Caldwell may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Hutchinson.

**STATEMENT OF HOWARD HUTCHINSON, EXECUTIVE DIRECTOR, COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH, GLENWOOD, NEW MEXICO**

Mr. HUTCHINSON. Thank you, Mr. Chairman. I represent the Coalition of Arizona/New Mexico Counties and I've had a rather remarkable journey arriving to that position as Executive Director, having been through the radical environmental movement and actually having been associated with Earth First in the early nascence of that organization.

And I have found myself now at a crossroads, looking at the process that we decide environmental issues on, and that is the National Environmental Policy Act.

The role of tribal, state and local governments was established under the NEPA and in the late 1980's, the state and local governments, particularly county governments, began to feel the physical impacts of reductions of revenue from economic activities on the Federal lands.

This prompted research into the Federal statutes and regulations, which disclosed the requirements for inclusion of non-Federal governments in the environmental planning process. But up until that point, we had not really informed ourselves nor been informed of the ability for us to participate.

Years of no active participation, followed by this keen interest, caught Federal agencies by surprise. If the past history of regulatory direction is an indication, the role of non-Federal governments will be defined over a period of years through judicial interpretation.

And I think that's one of the reasons that I'm here today, is to have Congress take a look at possible remedies rather than years of court battles.

One of the major areas of contention at this point, and it was alluded to earlier, was the recognition or being requested by the land management agencies or Federal agencies to be joint lead or cooperating agencies in actions affecting the environment within non-Federal government entities' jurisdiction.

A number of conflicts have arisen out of this and I think it was properly portrayed earlier that those conflicts have not been resolved in favor of local governments or state governments or tribal governments and a number of pieces or a number of legal cases have been initiated as a result of denials of cooperating status.

The administrative appeal process, which is part of that granting of cooperating or joint lead agency status, usually results in upholding the decision not to grant joint lead or cooperating agency status. This is usually long after the agency decision is implemented. At this point, the only option left to the counties is Federal court.

During this delay, the adverse impacts to the local environment continue and I should stress at this point that it's the local environment, and it's not just the economic, social and cultural impacts, are having tremendous physical and biological adverse impacts.

Federal agencies cannot nor should they bear all the responsibility for the lack of non-Federal government participation, because the law was there. The county, local governments, state governments, tribal governments could have participated. However, Fed-

eral agencies had an obligation to notify them of the ability to participate.

One of the things that was alluded to in earlier testimony was a discussion about significance, significance of the action itself and significance of issues that are raised to be looked at in the NEPA process, and, again, this is an area of conflict.

What we have seen is agencies and local governments disagreeing over the significance of impacts. And just a quick example, in Reserve, New Mexico, which comprises about 400 people, it's the county seat, 35 people were laid off from the sawmill when it was shut down over a Federal decision. Those 35 people don't sound like very much, but it was 20 percent of the work force in that area. And had that occurred in a major metropolitan area, Congress would have heard a scream that you wouldn't have been able to ignore.

But those 35 jobs were very important and, therefore, significant to that local economy and the significance was ignored because the statewide analysis was done, and it was a brief one at that, on the economic impact.

Federal agencies are in gridlock. No responsible official can make a decision that follows all of the procedural requirements contained in all the statutes and all the regulations all of the time. Clearly, Congress has an obligation to bring resolution to this and get uniformity into the decisionmaking process, because it goes across lines of the National Forest Management Act, Federal Land Management and Policy Act, the Endangered Species Act, the Clean Water Act, the Clean Air Act, and on and on and on. All of these have NEPA implications and they all have stops in them, and those stops are killing us.

Thank you, Mr. Chairman.

[The prepared statement of Howard Hutchinson may be found at end of hearing.]

Mr. POMBO. Thank you for your testimony. One of the things that you said in your testimony, Mr. Hutchinson, was that you believed that the local environment suffered in this delay game that we go through in the NEPA process. Can you give me an example of that?

Mr. HUTCHINSON. Yes, Mr. Chairman. Apparently—and I'll just give you a local example, an on-the-ground example from my area. The Gila National Forest is a watershed for our local area. We have had a significance decline in the quality and quantity of water coming off of those national forest lands.

We identified that as a significance impact. Yet, the Forest Service refuses to even analyze that and in the last forest plan amendments that were run through the NEPA process, they didn't even—they barely looked at it. There was a paragraph that was maybe an inch and a half high on a Federal Register page devoted to any of the hydrologic cycle impacts.

So these types of things are going on all the time. And then also the significance of impact to the local economies, to our schools, our road maintenance. All of those things are cavalierly cast aside as not having significance and, therefore, do not receive analysis.

Mr. POMBO. Let me ask you this. If counties and states were brought in as a partner in this process, do you believe that environ-



mental issues and local social and economic concerns would be a part of the final document?

Mr. HUTCHINSON. Absolutely. What started out and was called the county movement started in the county that I'm from, in Catron County, New Mexico. I played a part in drafting a lot of our land use plan and looking at the laws.

I am very proud to say at this point that at least it has reached this level of recognition in Congress, but also at the state level with the BLM in the development of standards and guidelines for range land management in the state.

The state has been granted joint lead agency status. Several counties who have significant BLM lands have been granted co-operating agency status. And those entities have members on the interdisciplinary teams actually drafting the NEPA document and it is making a significant difference in the outcome of the environmental impact statement.

Mr. POMBO. Mr. Loesel, would you support—and I don't know if you've seen Senator Thomas' bill, but would you support an idea of requiring that the states and counties be equal partners in developing the document?

Mr. LOESEL. I have not seen the bill.

Mr. POMBO. But just in general, and I won't ask you about that specific piece of legislation because I would not expect you to have read it.

Mr. LOESEL. I'd have to think about that. I can tell you that when we were doing Opportunity Area Analysis on the Jefferson National Forest, it allowed for active state involvement. A number of agencies found it worth their time to focus on the decisions that were being made as part of the Opportunity Area Analysis.

I've seen a substantial decline in the state's participation as all these small decisions become very diffuse. Game and Inland Fisheries can't keep up with that volume of work to comment.

I can think of two or three other agencies that are no longer at the table. I'm not certain that it's a question of a legal requirement. I think it's making it attractive for them to participate, to feel their input is meaningful, and to understand where their input would have some effect.

Mr. POMBO. If they were included and it was a requirement that they be included from the very beginning, their impact would be part of the final work product. It would be required that they be an equal partner in developing an EIS or an environmental assessment. It would be a requirement that they be involved with it, instead of someone from a Federal agency coming into your state or your county and saying this is what we've decided and we wanted to update you on it.

It would be, from the very beginning, someone would come in and say this is what we're looking at and we want your involvement in this from the very beginning and not someone coming in from the end.

One of the complaints that I have heard from a number of western states is that their first involvement in it is when the decision has already been made.

Mr. LOESEL. You mean they weren't on the scoping list?

Mr. POMBO. No.

Mr. LOESEL. That seems hard to believe.

Mr. POMBO. I actually have one particular project in my district that a community meeting that was held, and a year and a half after the community meeting was identified as a scoping session. It was not at any time prior to that ever identified as a scoping session. It was a community meeting that was not attended by the state officials, the county officials, because it was a community meeting to discuss planning in one particular area or how they were going to deal with some environmental problems in one particular area.

A year and a half later, it was identified as a scoping session and the final document that they ultimately came up with, that was ultimately presented to the county and state officials, supposedly was drafted from the input that they got at that one community meeting.

Mr. LOESEL. We don't let them get away with that kind of stuff in Virginia. I mean, we whip them into shape, I think.

Mr. POMBO. As the Governor testified earlier, I think he would take issue with what you just said in that he wouldn't let them get away with it either, but the way that they do things is not exactly the same from state to state.

Mr. LOESEL. I recognize that. But I think we have played an important role in shaping how the Jefferson and the George Washington interact with the public.

For instance, as part of the settlement agreement on the appeal of the Land and Resource Management Plan that was done for the Jefferson National Forest back in 1985, there was a requirement that there be an annual conference at which the Forest Service lays out for the public those projects which are going to be put on the table in the next year and to provide some background information.

We are very proactive in making certain they tell us what it is that they want to put out there. If they don't do that—if they don't give us advance information before they do scoping—we're on their case.

We make certain that there are extensive lists where people get notice of NEPA opportunities. It's hard for me to believe that people who want to be involved would not be on lists—that they would allow that kind of action to go unchallenged.

The public and officials have some responsibilities here.

Mr. POMBO. There is a very different relationship. Let me turn to Mr. Leftwich just for a second. Has that been your experience with this process? Have they been forthright and notified everybody that this is what they were looking at and this is a scoping session that we're going to go through?

Mr. LEFTWICH. In some cases, yes, in some cases, no. It seems to me the problem, though, with scoping is that the agency, particularly the lead agency is reluctant to, at some point, say we have scoped this. And what has been our experience is that additional commenters will come in at the eleventh hour in this process over here on the chart and suddenly you're back to square one.

So there seems to be the need for opportunity for public participation and then at some point in the process there has to be a time where that's it, we have scoped this, these are the issues, and we're moving forward. And lead agencies are reluctant, in my opinion, to

take that responsibility and roll, primarily because of the litigation and the appeals process that's been alluded to all day long.

They feel like they are under a microscope and they're going to be sued if some commenter comes in right before the final EIS document hits the streets and raises another issue that requires an additional study that causes another delay and then you're back in the loop here.

So I'm not sure—I think the whole public participation scoping issue needs to be emphasized and one of the suggestions that I would make is that Congress and CEQ ask for periodic reports from the agencies about their implementation of NEPA.

I know of major land management agencies that don't have NEPA in their budget. It's not an identified line item that goes down to the district level where these projects are actually implemented.

So what that says to me is it's not a priority, they're not budgeting for it, they're not staffing for it, there is not even some basic management skill sets within the agencies to get through what is a fairly complicated process.

You throw in the integration of the other environmental laws that kind of get wrapped into this envelope of NEPA, where you're analyzing the Clean Water and Clean Air issues and ESA gets thrown in and 404 permitting from the Army Corps of Engineers and a multitude of other environmental laws that have specific permit requirements that are also looked at in the overall context of baseline information included in a NEPA document.

Again, I think it goes back to who is charged with the responsibility of that process and that's the lead agency. So there's two or three key areas there. I think the public scoping is certainly one of them and the participation and then putting some sideboards on the process, and that's what we attempted to do because we had so many going on at the same time. We had four.

We didn't really understand all the steps and the agencies certainly didn't really understand all the steps, and we're reluctant to commit to time-frames.

The CEQ regulations talk about major energy project development and implementation under NEPA not taking over 12 months. Well, that's kind of laughable given the time-frames that we're dealing with now.

Mr. POMBO. What is the typical time-frame you're dealing with right now?

Mr. LEFTWICH. Multi-year, three and a half to 4 years, some as little as 27 months.

Mr. POMBO. And that's if there's not any litigation.

Mr. LEFTWICH. Yes, and that's not including appeals. There are certain industry activities, and mining just happens to be one of those poster child type for the environment, that are appealed automatically. There are environmental groups in the west that automatically appeal every NEPA decision that has to do with mining. So that's a given.

So that is even an add-on to this process that I've illustrated here. When appeal is then issued, the agency is the one who has to defend their decision and many times they don't have the legal resources and/or the technical resources to really do that, and then

it falls back on the proponent to help provide that information and then the industry is criticized because they're controlling the process.

So you just kind of get into this tailspin here of a loop that you can't get out of and I think if we were to sit down and say what is the really objective here, it's to analyze the impacts and spend time, money and people, those resources, to mitigate and to enhance the environment instead of the process, but we're spending all the resources on the process.

Mr. POMBO. I think that's an important point and it is something that Mr. Hutchinson brought up earlier and that we have had other people testify to during this hearing, is that we end up spending the money, the time, the energy on the process and begin to forget that the reason we're doing this is for the environment.

What's the typical cost of going through a NEPA process on a mine new that you're involved with?

Mr. LEFTWICH. Of the four that we went through, the least expensive one was about \$1.2 million. Another one was \$6 million and the company—

Mr. POMBO. That's just process.

Mr. LEFTWICH. That's to get to a record of decision.

Mr. POMBO. You're not talking about doing anything for the environment. You're talking about \$6 million of paper.

Mr. LEFTWICH. That's correct. And what's deceiving about an EIS is if I were to bring in a typical mining EIS document, it may be two or three inches thick. But what most people don't understand is the huge amount of research, baseline data work that goes into compiling—it's a summary document. If you look at your handout of the process and the steps there, each one of those baseline studies may be another pile of paper, depending on the issue, ground water modeling, wildlife, all of those resources that are studied.

And so those become a huge pile of paper there that back up the document which is really written to summarize the studies and to make some decision.

Mr. POMBO. Let me turn to Professor Caldwell for a minute. One of the things that you stated a couple of times in your testimony was that a renewed commitment to NEPA, additional dollars to fund it, is what it needs.

One of the problems that we have in looking at this whole process is that you look at a document like he's got laid out there that takes three and a half to 4 years, cost \$6 million. How will additional money and people and a renewed commitment to the NEPA process shorten that?

Mr. CALDWELL. Mr. Chairman, I do think the additional funding would enable the CEQ to more extensively consider these problems. But let me add that there is a larger problem that hasn't been referred to and this ties now, I think, to the succession of Presidential Administrations.

Under the Constitution, the President has the responsibility to take care that the laws be faithfully executed. But we have had a succession of Presidents that have not shown a very great enthusiasm for the implementation of NEPA.

That does not mean that they have been opposed to it, but NEPA needs the very clear signal and support from the White House and

also an objective kind of inquiry coming from the Congress to see that the NEPA intent is implemented.

This Act was never intended to produce million-dollar impact statements nor to require the length of time that some of them take. We had, I think, the Alaska Pipeline impact statement that weighed about 50 pounds. Now, these are not to be attributed to the law itself.

Mr. POMBO. What are they to be attributed to?

Mr. CALDWELL. To the misapplication of law, both in the Congress and the White House.

Mr. POMBO. Do you think that they ever intended for the CEQ to become a super environmental agency?

Mr. CALDWELL. No.

Mr. POMBO. That would have one person as the head of it and they would have complete and total control over all other agencies?

Mr. CALDWELL. Well, that is not the case now and it was never intended to be the case. The reason that the CEQ now has one councilor, Katie McGinty, is due to what I would regard at least as a judicial decision that under the Government in the Sunshine Act.

If the three members of a council have meetings together, attempt to work out policy positions and so on, that those meetings must be scheduled, there must be notice, and they must be open to the public.

Now, there are meetings, of course, where public participation is very desirable, but there are other kinds of problems that—where a committee needs to work through the issue before it can take an informed and intelligent position.

So that I do think that it is a mistake to regard the CEQ as a potential high court for the environment or super agency. My disappointment, I guess, with respect to the CEQ is that it has not been able to be more effective.

If you look at the section of the law which creates and empowers the CEQ, there are many things that it has not done, that it has not been permitted to do, in effect, by under-staffing and by under-funding.

For example, we have had several bills introduced into the Congress, one of them, interestingly enough, by what some people regard as an odd couple, Gore and Gingrich, calling for an estimate or some kind of a facility in the Federal Government for looking at or forecasting trends in environment, population and resources.

You would think that this would be a very rational kind of thing to do, but it never gets anywhere with the Congress. Now, as I would read Section 202 of the National Environmental Policy Act, the CEQ could initiate such action if permitted to do so. But whether it's permitted to do so depends, I think, very significantly on Mr. President and on the respective committees of the Congress.

There has been, to me, unaccountable, that there should be in the Congress such a resistance to any attempt to forecast. By that, I don't mean predict. I mean to look at the trends that are occurring in the society, their interactions, to the best of our knowledge, and draw from them at least certain findings with respect to the direction in which we're going.

Now, we don't do that.

Mr. POMBO. You don't understand why there would be concern?

Mr. CALDWELL. Pardon?

Mr. POMBO. You don't understand why there would be concern?

Mr. CALDWELL. Well, the Wall Street Journal at one point had an editorial to the effect that this was going to be a bad idea because it would destroy consumer confidence, that we can't predict, we don't know what's going to happen in the future, and, therefore, it would be a waste of time and money.

I don't agree with that assessment at all.

Mr. POMBO. But when you have government agencies that do things like this and have this kind of a result, when you talk about expanding their power to that degree, it obviously is going to cause some concerns amongst the Members of Congress that the result will not be a streamlined process, but a much more heavy process that people have to go through that when you begin to shift everything to the Federal Government, you begin to cut counties and cities out and you begin to say if you want to do anything, you have to come to these 13 government agencies to get approval.

All of a sudden Members of Congress begin to get real nervous about doing that. It's not that anybody is afraid of information. It's not that anybody is afraid to find out what the forecast would be. It's placing all of that power in the hands of one person who may have an agenda, who happens to be running one of the agencies. That's what the concern is.

Mr. CALDWELL. That certainly was not the intent nor the content.

Mr. POMBO. From an academic point of view, sitting there as a professor with a great resume, you can say that this would be great if we had this information. As a policymaker sitting on this side, I'll tell you it scares the heck out of me to give that kind of power to the agencies, because this is not a one-time event for me. I get people walking into my office every single day from my district with lists like this or with 7-year processes to get a grazing permit approved. That happens in my office every single day.

So we have to try to figure out a way to protect the environment without punishing our citizens the way that we're doing right now.

Mr. CALDWELL. Well, I certainly agree with what you say, but I do not follow the reasoning that an attempt to track the trends that we now have, we can see in our society, to indicate how matters of population, resources, environment interact, and these are basically human problems, how that is going to create great power in any particular individual.

Certainly there is nothing, in my view, of that as a policy question that would lead to that conclusion. I mean, the Congress has, certainly, the power to create whatever kind of institution and to lay down what groundrules would be desirable.

Mr. POMBO. Let me interrupt you just on that point. You heard the testimony earlier about the American Heritage Rivers Initiative. That was not a Congressionally approved project. In fact, Congress said no, but they did it anyway. They took that power from Congress and created that agency anyway.

So to say that we could just sit down and say you guys have to stay within the rules, well, maybe in theory that's the way it would work. In reality, that's not the way it is working.

So there is some confrontation between the legislative branch and the executive branch in who gets to lay down the guidelines. I mean, everything that we're talking about here supposedly is a law that was passed by Congress and Congress has the ultimate decisionmaking power, and that's not necessarily the way it works in process.

The way it works in process is these guys spend 4 years and \$6 million coming up with a document that has dubious environmental quality to it and it's just a \$6 million stack of paper. Now, if you ask Congress, would you rather them spend \$6 million on a stack of paper or actually do something to protect the environment, it would pass out of here unanimously to do something to protect the environment. But that is not the process that we're going through right now.

So anytime we question the process, all of a sudden it becomes a question of whether or not we want to protect the environment. It has nothing to do with that. It has to do with six inches of paper and \$6 million.

Mr. CALDWELL. Well, the complaint, it seems to me, there is to be directed toward the agency that is administering grazing permits or building access roads in the forests. It is not to the National Environmental Policy Act.

We have the Public Land Management Act, we have the national forest legislation, and those are principal authorities or sources of authority on which those agencies act.

Now, the power in the executive branch is certainly diffuse. I would argue for more effective use of the Executive Office of the President, which was created in 1936, during the Franklin Roosevelt Administration, to provide for a better oversight on the part of the Executive of the various agencies in the executive branch.

It's been observed by some students of what the Federal Government does, that some of the agencies have been mandated by the Congress for particular reasons, for particular interests, to take certain kinds of action. These are issues that are often popular with particular Members of the Congress, but they also preclude an agency decision. If an agency, for example, is the Forest Service, through some, say, rider to an appropriation bill, mandates a clear-cutting of a large area in a national forest, the Forest Service is bound perhaps to do that, to follow what the Congress has decided.

But many of these issues are not necessarily reflective of public opinion generally. They may be highly localized in their—both in their impact and their impetus. I mean, the power and activity that has brought about this legislation.

So I think it's a more complex situation than perhaps we might—

Mr. POMBO. But that's not—in theory, I understand what you're saying. In reality, two years ago or so, we passed the salvage logging bill through the Congress, through the Senate, signed into law. The executive branch refused to abide by that law and never implemented that law.

It was passed, it was signed into law. They just decided not to do it. They didn't like it. So they never did it. There's a number of pieces of legislation that have been passed through this Congress that because of lawsuits or an agenda of someone within the execu-

tive branch never get implemented, and we end up with this kind of a confrontation between the legislative branch and the executive branch.

I think that Mr. Hutchinson and what they have gone through, as they have been extremely proactive in trying to have local community involvement with these decisions.

What Mr. Loesel is describing is having local community involvement and locally based people involved with these decisions. The way the process currently works, that just doesn't happen. I'm glad that Mr. Loesel claims he has not had those problems. I'm happy that he hasn't.

If you were to talk to my constituency, you would hear a very different story than what we are hearing from you, because it's just done differently in different parts of the country.

Mr. LOESEL. Maybe you need me to come on out there and help organize some things.

Mr. POMBO. That may scare my constituents more than—

Mr. LOESEL. Yes, it may. Could I answer a question that you asked initially about mandating through legislation involvement of states and—help me out with the other aspect.

Mr. POMBO. It was to mandate the state and county involvement.

Mr. LOESEL. In theory, there may be one answer. Practically, I think there's not going to be enough money in the county or state budgets to get involved in all of the decisions. The practical result of that would be that the process would come to a halt. If it were structured in such a way that it required their active involvement and they don't have the money, then nothing could proceed.

So I would be very careful about developing a process that requires—that wouldn't work unless their involvement were—

Mr. POMBO. What is the annual budget of the organization that you represent?

Mr. LOESEL. About \$4,000.

Mr. POMBO. And do you participate in the process from the beginning?

Mr. LOESEL. Sure.

Mr. POMBO. And your county that you live in could not come up with \$4,000 on an annual basis to have somebody participate in the process?

Mr. LOESEL. But there's a difference. Most of the involvement from our organization is volunteer. They do it because they want to. You don't get that kind of volunteer activity from state agencies and from county agencies. It doesn't happen.

Mr. POMBO. Mr. Leftwich.

Mr. LEFTWICH. Mr. Chairman, this has raised an issue that we maintain is a huge problem with the current implementation of NEPA. It is that the agencies themselves don't have the wherewithal to implement this process over here. They don't have the technical staff and the management skill sets. They don't have the resources, period, in many cases to do this, and that's why there's these huge cost over-runs and it ties back into the process has kind of gotten out of control.

It's not just gridlock. They cannot fulfill their mandate to implement NEPA.



Mr. POMBO. I understand what you're saying, but I'm not going to agree with you, because I happen to be involved with the budget process, as well, and I would suggest that you take the Interior Department's budget and look at how much money they get. It's a matter of priority. It's not a matter of whether they have the money.

Mr. LEFTWICH. I think that's right. I think that if you talk to many agencies, it's not even a budget item at the local level for NEPA implementation, and yet it's a requirement of the law.

Mr. POMBO. It's a requirement, but it's not a priority.

Mr. LEFTWICH. Yes, that's the problem. Plus, the process has become so cumbersome, I think that if the process was back streamlined to a reasonable level, that there would be adequate resources to produce the type of analysis that I think was envisioned in the beginning.

But it's gotten so complex and out of hand that, in fact, agencies themselves, even if they had a budget, would probably not be able to staff adequately to do the level of detail that everyone in the world wants done in EIS's.

Mr. POMBO. Well—yes, sir.

Mr. HUTCHINSON. May I address that point?

Mr. POMBO. Yes.

Mr. HUTCHINSON. The process of involving non-Federal government entities, soil and water conservation districts, counties, states and tribal governments, we're talking about specific jurisdictions. Those entities already have plans and policies in effect.

They already have state statutes and county ordinances that they are carrying out. The object in the NEPA process is disclosure, disclosure to the Federal agency decisionmaker what those plans and policies are.

We're not talking about giant expense. Certainly, at the onset, when we got into this process, we had to do some economic analysis. We had to go out and hire some biologists and culturalists, et cetera, to take a look at it. But this is simply part of the checks and balances of our system. That's what those states are out there for. It's part of the check and balance system in our Federal system.

So the additional cost or involvement in that is just part of the way of doing business in our country and most of those budgeted items are already in there. And as far as our county organization, we encourage voluntary participation by the citizens in the community on those communities that are bringing this input to the table for those Federal agency decisionmakers.

Mr. POMBO. Let me ask you a question. You said you're involved with local planning in your county.

Mr. HUTCHINSON. Yes.

Mr. POMBO. Did you abide by Federal, state and county environmental laws when you developed your general plan? That's what we call them in California, a general plan. Did you abide by the laws or did you ignore those and just do what you wanted?

Mr. HUTCHINSON. I think I would say that we abided by the principles, because there really wasn't any guidance for the area that we were going into. And the type of land planning that we're talking about, again, is more like a NEPA document. It's disclosure of

the conditions, disclosure of the existing conditions, a reasonable prediction of future conditions, and will the natural resources that are there fulfill those needs in the future.

That's a planning document. You can have social engineering, which is what a lot of planning documents end up as, or you can have a planning document that offers disclosure to decisionmakers, what the conditions are and what the possible conditions in the future are going to be.

That's the way our document turned out.

Mr. POMBO. Thank you. I want to thank this panel very much. We could go on the whole rest of the afternoon discussing this. But I appreciate your patience in waiting for the Committee to get to you. I appreciate your testimony and answering the questions a great deal.

There will probably be additional questions that we will submit to you in writing. If you could answer those in a timely manner, we will hold the hearing record open for 10 days so that you can respond to those, but I know that the Chairman of the Full Committee did have some additional questions that he would like to ask.

Unfortunately, he was not able to get back from his meeting before we adjourned. So I'm sure that there will be additional questions that he will have for each of you.

Thank you very much. The hearing is adjourned.

[Whereupon, at 3:35 p.m., the Committee was recessed, to reconvene at the call of the Chair.]

[Additional material submitted for the record follows.]

LETTER OF ROBERT S. LYNCH, CHAIRMAN OF THE BOARD, CENTRAL ARIZONA PROJECT ASSOCIATION, PHOENIX, ARIZONA

Dear Mr. Chairman:

Thank you for the opportunity to testify at the Committee's September 24, 1997 hearing on the American Heritage Rivers Initiative and H.R. 1842 proposing to terminate further funding for this new "program." I hope our reasons for keeping this spurious adventure out of the Colorado River Basin highlighted the potential for confusion and duplication of effort we see in the Initiative.

I was troubled by the testimony of Kathleen McGinty, Chair of the Council on Environmental Quality. Specifically, I was mystified by her bald statement that Congress had authorized the Initiative in passing the Policy section (42 U.S.C. § 4331) of the National Environmental Policy Act (NEPA). My notes reflect that she directly claimed that Section 101(b)(4) of NEPA constituted Congressional authority for the Initiative.

My first reaction was: Why did it take the executive branch twenty-seven (27) years to discover this programmatic directive? Since NEPA is written in mandate format, how could this have escaped litigation by environmental groups for so long? Obviously, it couldn't because the authority doesn't exist.

My second reaction was that the Supreme Court had dealt with this issue, making Ms. McGinty's position even more amazing. I did some research and thought I should share the results with you as you consider taking action on H.R. 1842.

#### **Section 101 of NEPA neither authorizes nor requires action**

The nature of Federal agency obligations under NEPA has been the subject of a number of Supreme Court decisions. In a nutshell, these opinions say that Section 102 (42 U.S.C. § 4332) contains the procedural requirements of NEPA, the so-called "action forcing" provisions, which are the only requirements of NEPA. NEPA contains no substantive law and invoking NEPA does not interfere with the ultimate agency decision if NEPA processes have been correctly conducted.

Beginning at least with *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Supreme Court identified the NEPA "program" as its action-forcing procedural duties under Section 102. *Id.*, 427 U.S. at 409, n.18. Section 101 has been consistently described as a set of national goals. "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); accord, *Stryker's Bay Neighborhood Council v. Karlan*, 444 U.S. 223, 227 (1980). As recently as 1989, the Court has distinguished between Section 101's declaration of "a broad national commitment" and Section 102's "action-forcing procedures." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

This being the case, no programmatic authorization can be tortured into NEPA goals. Any such new program must come from Congress.

I hope this analysis is of some utility as you continue to address the Initiative and H.R. 1842.

---

STATEMENT OF RANDY L. ALLEN, GENERAL COUNSEL, RIVER GAS CORPORATION,  
NORTHPORT, ALABAMA

I am general counsel for River Gas Corporation, a closely held independent operator of coalbed methane wells with approximately 100 employees. Since 1991, River Gas has purchased approximately 128,000 acres of oil and gas leases within a 300 square mile area in Carbon and Emery Counties, Utah, including 76,000 acres purchased from BLM, 27,000 acres purchased from the State of Utah and the remaining acreage purchased from private landowners. We currently operate 114 wells in the area, but we have not drilled a single well on our Federal leases.

In February, 1994, BLM notified us that we could not develop any of our leases until after an Environmental Impact Statement was prepared. BLM was the lead agency. No other Federal land management agencies were actively involved. One of my responsibilities was to coordinate River Gas' limited role in the EIS. We initiated the process in April, 1994, by submitting a proposal to drill up to 1,000 wells on our leases. The original schedule called for completion before June 1, 1995, and the original budget was \$200,000. The Final EIS Record of Decision was signed in May, 1997, over 3 years after it began and almost 2 years late. EIS expenses were over \$1.3 million, \$1.1 million over budget.

No environmental groups opposed the project. Local sportsmen were concerned about potential impacts to deer and elk. Most of the opposition came from governmental employees, primarily from within the BLM. Early in the process field agents of BLM indicated that they opposed our proposal and they would make the process

as difficult as possible. As a result, the process quickly became adversarial. Individuals in the same organization that sold us property rights for a lot of money were actively working to block us from making use of the property it sold us.

Based on our experience, we are concerned governmental agents may retaliate against us because of my appearance to testify, causing River Gas additional harm. We would like the ability to return in event retaliation occurs.

Most BLM employees are hard working, conscientious, courteous, fair and reasonable. They sincerely try to do the right thing while handling an overwhelming workload with limited time and limited resources. Their jobs are not easy, particularly considering the complex and sometimes conflicting directives they must follow. They have fairly broad discretion to analyze each individual situation on its own merits, and try their best to issue well reasoned and fair decisions. When these people control the NEPA process it seems to work well.

Unfortunately, there are a few bad apples. Through the free rein allowed by the current NEPA system, these agents can kill proposed projects by requests for expensive data acquisition, simple stalling, and other tactics described below. The system is flawed because these actions are allowed to happen without oversight and with no forum for project proponents to seek timely redress of abuses.

We were fortunate. We survived the EIS process. If we did not control leases on a block of State and private acreage or had not been backed by larger financial partners, we would have been unable to drill our existing 114 wells. Without our partners and the producing wells, we would have been unable to cash-flow the EIS process. It would have killed us because we had invested our entire future on the Utah properties. Not all small companies are so lucky and few projects in the West can be partially developed without accessing Federal land. The uncertain timeframe and unpredictable up-front cost associated with developing Federal land are forcing larger companies overseas and crushing small companies.

Of equal importance for state and national concern, the vast natural gas reserves underlying the project would likely never be developed if we had been unable to withstand the process. In 1997, we sent \$2.3 million to the State of Utah in royalties, dedicated for the benefit of Utah school children. If we would have been forced to abandon the project before it was proven, it would have become tainted and other companies would have been hesitant to take on the risk. But for a stroke of luck, Utah school children would have lost a considerable resource and the U.S. taxpayers would have lost the potential for significant income.

The NEPA process involves four critical steps: (i) identifying significant issues, (ii) describing what is known about the environment, (iii) developing alternative development scenarios, and (iv) analyzing how each alternative will impact each aspect of the environment. Each successive step builds upon the earlier ones. Changes late in the process can cause significant backtracking, delays and cost increases. For example, if a new issue is identified during impact analysis, the new issue may require additional data to describe unique aspects of the environment, modification of alternatives and new impact analysis.

Field agents of the lead agency must be actively involved for successful completion of each step. As each step can involve broad discretion, avenues for abuse exist.

As the project proponent in the third party EIS process, we agreed to pay a consultant to perform work on behalf of BLM. We were told that, based on BLM time and budget constraints, if we preferred to have BLM prepare the document in-house they would not have been able to complete it until 2005-2010. The consultant was to work under BLM supervision. Our involvement was limited to paying the bills, becoming involved with schedule concerns, designing our proposed action, and negotiating how much new information would be gathered through field surveys at our expense. We were included in discussions while alternative development scenarios were being developed. We were not involved at all with impacts analysis or discussions setting methodology. We wanted to make sure we had absolutely no influence on this part of the process. We did however pay enormous bills for the work. By signing the MOU we had signed a blank check, and we had created an interesting marriage. River Gas, a company in business to make profit, had agreed to pay for a government project. We knew up front that our involvement would be limited and that at times we would not even know the details about what we were paying for.

Examples from our experience follow.

#### *Identifying Issues*

Issues are identified through agency scoping and public scoping. Ideally, agency scoping should occur before public scoping to provide a strong foundation for public input. We understood this would happen on our EIS, but it did not. We also understood that public scoping would last at least 30 days, but that BLM would continue

considering new issues submitted after the deadline. We were told that public scoping never really ends, setting up strong possibility of future backtracking.

We were very concerned about endless public scoping, but as it turned out it was not an issue in our EIS simply because the public did not identify many significant issues. The real problem in our situation was that agency scoping continued well into the process, creating an extremely fluid situation.

In April, 1994, we met with BLM representatives from the Price River Resource Area office and the Moab District office to initiate the EIS. Price controlled all the data critical for the process and the EIS team leader resided in Moab. The State Director maintained signatory authority over the project. BLM informed us that certain data gaps existed, and we made plans to fill those gaps by contracting with third parties to conduct field surveys. We discussed that agency scoping would take place during the contractor selection process, and that as soon as the contractor was selected, a kick-off meeting would be held to (i) introduce each BLM resource specialist to each expert from the consulting company, (ii) discuss BLM expectations for each significant resource, (iii) cover methodology concerns and (iv) transfer all available data. We wanted everyone to be on the same page.

The contractor was selected on schedule and the kick-off meeting was held on July 28, 1994. We flew the entire consulting team from Denver to Price for the meeting. We envisioned a serious group meeting followed by individual meetings between the experts, a field tour and data transfer. I thought the consultants would be leaving with clear direction, knowledge that they were on the same page with BLM agents, and truck loads of information. None of this happened. The meeting was chaotic. BLM field employees were not prepared. They came and went freely during the meeting. It was clear that they had given no thought to our proposal, the EIS or anything related to the meeting. Several comments were made by BLM agents that they wanted to see our proposed action, which had been available since the April meeting. No data or guidance was transferred.

It was clear that the project was in serious trouble. Our budget and schedule were based on the assumption, supported by the EIS team leader, that if we filled certain identified data gaps all other data would be readily available. The schedule called for consultants to begin describing the environment during public scoping, so the alternatives could be defined immediately after scoping and the impacts analysis could proceed shortly thereafter. The original \$200,000 budget was based on this also. Because we had no cooperation or concern from the Price office, the entire game plan which had developed from the April meeting had dissolved. Since the budget and schedule were based on the game plan, they were no longer valid.

Although agency scoping had not really begun, public scoping began in August, 1994. A public meeting was held on September 8, 1994 in Price. The BLM hydrologist and BLM recreation specialist each arrived with a separate group of friends. On several occasions during the presentation, I noticed that the BLM hydrologist leaned to the gentleman sitting next to him, whispered in his ear, then the gentleman rose to ask a question relating to water issues. The same thing happened after the BLM recreation specialist whispered to those around him. It was my impression that BLM agents were rallying opposition to our proposal during the public scoping meeting.

No significant new or unexpected concerns were raised by the public. I don't recall any detailed discussion about deer and elk being a major concern during the meeting. Most of the discussion centered on socioeconomics, noise, air quality, water quality, and visual impacts, routine topics for an EIS. Following the meeting I was approached by the BLM wildlife biologist who stated that the biggest roadblock to our project would be deer and elk. I'll never forget the look in his eye as he said it. At the time I did not understand what he had said. I understood the words, but I could not comprehend how big game could be the deadly issue because it had not been raised. The meaning soon became clear.

#### *Data Availability & Adequacy*

During public scoping the Price office prepared a memo requesting libraries of new information that would be critical for beginning the EIS analysis. I thought we had settled all data issues when we agreed to fill certain data gaps the previous April, five months earlier. BLM's EIS team leader indicated we should not be overly concerned by the memo and that the issues would be resolved.

A meeting had been scheduled on September 16, 1994, the week following the public scoping meeting, to discuss the alternative development scenarios that would be analyzed in detail. The meeting took place in Price as scheduled, but no alternatives were discussed. The meeting focused on BLM's requests for additional information to describe the environment. The EIS team leader had been unable to resolve the issues. BLM requested that we pay to gather a great deal of additional

information through field surveys before the EIS analysis could begin. Some of the requests seemed legitimate, but others were outrageous. For example, the cultural resource expert wanted a class III survey of the entire 300 square mile area, which would entail a team of archaeologists walking the entire area separated by no more than 15 meters.

We needed a process to reach final resolution of the issues quickly. No one was available with the appropriate authority and no process existed. Simply because agency specialists issued requests, we were forced to have experts research the legal and scientific bases for the requests to determine whether they were appropriate. After we had performed our investigation, no procedure for redress was available to us. Responding to the requests was very time consuming and expensive. We agreed to perform some of the surveys, but not all of them. We attempted to resolve the remaining issues through follow-up meetings with the very agents who had requested the information in the first place. We had to convince them they were wrong without any objective oversight. It was a difficult situation.

During one of the meetings, the BLM recreation specialist said that he had moved to Price from California, he had seen what oil and gas companies had done there, and he was not about to allow that to happen in Price. I still do not know what companies had done in California, but he had clearly articulated his personal opposition to our proposed development. Other agents in the Price office made their opposition known through their actions and inaction.

Following several follow-up discussions, a meeting was held on November 4, 1994 involving BLM, USFS, USFWS and Utah Division of Wildlife Resources. By this time, the issues had been narrowed and the most significant issue involved deer and elk. BLM and DWR explained they had enough information to know where big game critical winter range was and where high value winter range was, but they needed to determine where the most critical portion of the critical range was. Without this information, DWR and the BLM wildlife biologist indicated they would be forced to protest the development. A three to five year survey was required at an estimated cost of \$500,000.

A DWR official indicated, with a great deal of emotion, that he knew our proposed development would decimate the elk herd and he was not about to leave that legacy for his grandchildren. When asked whether his assertion was supported by empirical evidence, he did not answer. The entire discussion was more emotional than scientific.

We could not conduct the survey. The projected expense was more than double our entire EIS budget and it would have delayed the EIS three to five years. Based on our reading of the CEQ regulations, adequate information was readily available to go forward with the EIS. However, based on our perception that BLM agents coached the public to oppose us during the public scoping meeting and DWR's obvious concern, we wanted to make sure there was enough information to avoid successful appeal. We ordered a literature review, which ultimately amounted to two inches of paper documenting studies performed on big game. It cost over \$50,000.

The consultant presented the draft to BLM in January, 1995. BLM requested an impact summary and conclusions. We objected because the EIS process itself is intended to assess potential impact, and there is no need to include it in a literature review. After discussion, we directed the consultant to prepare the impact summary and conclusion. They would need to do the work anyway in the EIS, so we believed it would not create extra work or expense.

Once the modified report was presented, BLM wildlife biologist objected to the conclusions and requested peer review of the report. It was our understanding that peer review should take place during the public comment period on the draft EIS. After additional delay on this topic, the literature review was finally accepted in October, 1995, over 11 months after it began and over 9 months after the first draft was submitted.

#### *Alternative Development Scenarios*

A range of alternative development scenarios, including the no action alternative and the proposed action, must be analyzed in detail in an EIS. While the events described above were ongoing, many meetings took place to develop the alternatives that would be analyzed in detail. Since the most significant concerns revolved around potential impacts deer and elk, the alternatives were developed with this concern in mind.

On December 1, 1994, the alternatives were finalized in concept. On May 23, 1995, almost 6 months later, we learned the alternatives had been thrown out by the Moab District Manager, the EIS team leader's boss, at the request of the Price BLM resource specialists. Through subsequent discussions with BLM, we believe the EIS team leader's efforts to gain control of the project were being thwarted by

field level BLM experts who were going over his head to change his decisions. As a result, the project was delayed and we were forced to pay the consultants to repeat work.

A new set of alternatives was finalized in concept during a meeting on October 26, 1995. For the first time during the process, the consultant had the clear direction necessary to move forward in earnest drafting the document. On February 5, 1996, the consultant presented the preliminary draft EIS to BLM for review.

The next month, during meetings on March 20–21, 1996, the BLM wildlife biologist suggested that a new alternative be developed for detailed analysis. In consultation with the Utah DWR, BLM at this time knew which portions of big game critical winter were the most sensitive areas. The areas were known as Security Areas, and a new alternative was presented on April 3, 1996, which would create no surface occupancy zones within the Security Areas.

The areas were depicted without regard to property ownership boundaries or our valid existing lease rights. Without becoming bogged down with those or other related concerns, we were very concerned about the data used to create the Security Areas. On November 4, 1994, we were told that a three to five year study was necessary to determine boundaries of the most highly sensitive portions of critical winter range. Approximately 18 months later, the information they desired had somehow become available and it was being used as the basis for a new alternative being proposed at an extremely late date in the process.

When asked whether any field surveys were conducted over the past 18 months, the BLM wildlife biologist stated that none had been performed and that the Security Areas were based on his 18 years of experience and his consultation with Utah DWR.

It is possible that the information was known in 1994, and the study request was simply an attempt to delay the process for three to five years. It is also possible that the Security Areas were not based on scientific information at all. In any event, it is unclear why it took 2 years after the EIS began for the alternative to be proposed by BLM. Nonetheless, the Security Area Avoidance Alternative was designed, drafted, analyzed in detail and presented as the BLM preferred alternative in the Draft EIS.

#### *Impacts Analysis*

After the environment is described and each alternative is designed, an assessment is made as to how each alternative will potentially impact each significant aspect of the environment. The system has established extreme deference to the judgment of Federal resource specialists on scientific issues. Scientists routinely disagree on how to interpret the same information and on how the impacts should be assessed. It is important that the government scientists agree on the methodology before the consultants begin their work. Otherwise, the consultant may be forced to repeat the analysis causing additional expense and delay.

Through our consultant I understand that BLM routinely responded to the consultants' requests for input on methodology with statements along the lines of "You are the expert, they pay you the big bucks to figure out those things." In general, there seemed to be an attitude among BLM resource specialists that they did not want to be bothered until the work was completed. So BLM did not know the thought process behind much of the work when the preliminary draft EIS was presented for BLM comment. Without the proper guidance up-front and BLM involvement during the work, the consultants' work failed to meet BLM expectations in several areas, leading to further backtracking, further delay and additional cost repeating work.

#### *Delayed Response to Preliminary Draft EIS*

To ensure the document meets lead agency approval before it is issued to the public, a preliminary draft must be reviewed by the lead agency and changes will normally be made. In an ideal situation, the lead agency works so closely with the consultant during the process that few changes are required. Our EIS did not follow the ideal scenario.

As discussed above, the preliminary draft was presented to BLM on February 5, 1996. BLM's EIS team leader agreed that all BLM comments would be submitted to the consultant by February 19, 1996. Preliminary comments were submitted on March 13, and a meeting was arranged for March 20-21 to discuss the comments in detail. During the meeting, major changes were requested including inclusion of the new alternative, later called the Security Area Avoidance Alternative.

The requested changes meant the consultant had to gather additional data and perform new impacts analysis. During the March 20-21 meeting, BLM resource specialists indicated they would provide the information to the consultant soon. On

May 7, 1996, the consultant still did not have the necessary information, so the BLM EIS team leader ordered the consultant to go forward with its work without the information. He was unable to force the resource specialists to perform their jobs, so he attempted to push the project forward without them. The consultant simply did not have what it needed to go forward and, even if it did, would have been reluctant moving forward without specialist approval for fear of future backtracking. On June 17, 1996, the consultant received the final guidance on which it had been waiting, nearly three months after it had been promised.

In an effort to avoid repeating delayed review of the second preliminary draft EIS, the EIS team leader issued a letter to the BLM Price office dated May 30, 1996, stating that only 2 weeks would be allowed for review of the second preliminary draft. The consultant submitted the document on July 15, 1996. A meeting was scheduled for July 31 between BLM and the consultant to review the comments. During the meeting an additional 3 weeks were granted so the review could be completed.

With the extension, BLM comments were due on August 22, 1996. They were submitted on August 27. The consultant made the requested changes and submitted the third preliminary draft on September 17, 1996. Following minor changes and BLM approval, the draft EIS was submitted to the public for comment on October 10, 1996.

#### *Public Comment*

Two public meetings were held, one in Price, Utah and the other in Emery, Utah. The vast majority of public comment favored the project. During the Price public meeting, the personal attitudes of two BLM Price office field experts came out once again. About half way through the meeting, following several comments favorable to our proposed development, the two stormed out of the meeting. They seemed to be outraged at the situation.

#### *Revisions Following Public Comment*

The public comment period ended on January 2, 1997. Based on public and governmental comment, a new alternative was proposed by BLM in consultation with Utah DWR. The concept of protecting deer and elk Security Areas was discarded in favor of a new concept: protecting drainage corridors, which were now believed to be even more important than the Security Areas, and requiring other significant mitigation for the benefit of deer and elk. The new alternative called for us to cancel plans to develop over 8,000 acres of leases we had purchased from BLM and the State of Utah in critical elk habitat (without compensation), agree not to conduct drilling or construction operations during the winter on critical and high value big game winter range (regardless of property ownership or lease rights), pay \$1,250 per Federal well drilled on critical big game winter range into a mitigation fund, and agree to special site location standards within drainage corridors which BLM and DWR had developed (potentially requiring well location contrary to BLM regulation). Individuals inside the BLM used the words extortion and blackmail, perhaps jokingly, to describe the situation.

It is interesting to see how NEPA, in some situations, has replaced formal rule-making under the Administrative Procedure Act. We were involved while the concessions were being developed, and we protested to some. But at that point, we had spent so much on the EIS, we were processing huge consultant bills each month, we saw the value of our initial investment in the field dwindling simply as a function of time, and we still had no idea when the process might end. We were in no position to raise legal arguments that would further delay the process. Again, timely oversight by an objective third party with authority would have helped.

We agreed to the concessions and the process began again. Information was gathered on the new alternative and a new impacts analysis was prepared. BLM field experts in Price called for a new draft to be issued for public comment, suggesting the new alternative would trigger a supplemental draft EIS. As with similar suggestions, this caused us to spend considerable time, energy and expense countering it. The law, regulations and CEQ guidance was clear on the matter. But it was difficult determining who we needed to convince. No procedure was in place. We had long since learned that arguing with the Price office would be a waste of time. While the EIS team leader wanted to do the right thing, he was without authority to render a final decision. We went to the BLM State office, which intervened.

Had the Price office succeeded once again in its delay tactics, the EIS may be ongoing yet today. Fortunately, the Final EIS was issued and the Record of Decision was signed in May, 1997.



### *Appeal*

In spite of our concessions to protect deer and elk, the ROD was appealed by an individual living over 100 miles away in Moab, Utah, citing concerns about potential impacts to deer and elk. The IBLA denied his request for stay, so we are able to move forward while the appeal is pending.

### *Post-EIS*

Although it was closely involved throughout the EIS process, over the months following execution of the ROD, Utah DWR expressed concerns that BLM did not require us to pay the same mitigation fee, \$1,250 per well, for wells on high value winter range. Meetings with BLM and the State ended without resolving the matter to the DWR's satisfaction. After we refused to pay the additional moneys for high value winter range, the BLM wildlife biologist guaranteed me that our permits would be appealed as a result of our refusal.

During the same timeframe, I heard comments through the grape vine that BLM agents from Price had said comments to the effect of "They may have made it through the EIS, but wait till you see how long it takes to get permits approved."

Over 9 months have elapsed since the ROD was signed. As of today, March 11, 1998, we still have not received a single authorization to conduct work on BLM land. We have submitted approximately 54 Applications for Permit to Drill, and approximately 5 right-of-way applications.

Delays since the EIS have not all been caused by the BLM, we have also been at fault. We have been learning the Federal permitting process, we have had errors on some reports submitted to BLM and have had other problems. We definitely share some of the blame.

A portion of the blame also lies with BLM. The same individuals who indicated they would block our development and who almost made believers out of us, are now working on the permitting process. The ROD was a bitter pill for them to swallow. Their dwindling opposition combined with their inexperience with the oil and gas permitting process had contributed to the delays. I hope we are getting on the right track.

### *Contrast with other BLM Offices*

In contrast with the EIS experience described above, our experience with the Rock Springs BLM offices is very encouraging. During very preliminary discussions that could lead to the NEPA process; resource specialists from every discipline attended meetings, acted professionally, offered input on what we should do to make the process go smoother, and generally tried to be helpful. I believe the NEPA process will be very different while working with the Rock Springs office. Where the right people are involved, the current system works well. But forcing companies to play Russian roulette is unacceptable.

### *Suggestions*

1. *Only Minor Changes.* We are all stewards of the environment, oil and gas companies included. It is my experience that industry wants to do the right thing. When used properly, NEPA is a valuable planning tool. We should be careful not to over-react based on situation such as ours.

2. *Oversight.* The NEPA can be very fluid. It is critical to gain control of the process before it begins and to maintain tight control throughout the process. By allowing discretion for field-level agency experts to make decisions on a case-by-case basis, decisions may be unduly influenced by personal agendas. Timely objective oversight to agency discretion is necessary throughout the process and at the end of each critical step to ensure accountability. The oversight could be through the legislative body, reimbursed by income derived from the project.

3. *Reimbursement.* Agencies rely heavily on the third party process, meaning companies must pay the NEPA bill. Everyone benefits from the process: the public at large is ensured of environmentally conscious decisionmaking, agencies acquire additional information to assist their efforts to do their job, and the project proponent can go forward in a prudent fashion. If the project is successful and the taxpayers benefit from Federal royalties, the project proponent should be reimbursed for the NEPA expense.

4. *Maximum Time Limits.* The process currently has minimum timeframes; ie, no decision can be made until a certain number of days has passed. There are no maximum timeframes. Particularly where government officials act like environmental groups opposing a project, maximum timeframes are essential. For example, the statute could be revised to state public scoping must last at least 30 days, and comments received after the 30th day will not be considered. It would also help to state

that no EIS would take longer than 18 months to complete. In the event it is not completed on time, the proposed action would be deemed approved.

5. *Follow-up Analysis.* Many assumptions are made during impacts analysis. Seldom are follow-up studies performed to determine whether the projected impacts actually occur as predicted. Sometimes assumptions are made simply because they have been used as a basis for previous EIS analysis. For all the time and expense that is going into NEPA processes, we are not learning enough. Follow-up studies should be performed, again through dedicated accounts set up from Federal income generated through the project.

6. *Restrict Governmental Comment to Agencies Involved.* Governmental agencies that are not actively involved in the EIS process should be precluded from commenting on the EIS. Comments signed by governmental officials carry a great deal of weight and create stronger impressions than those signed by average citizens. Where governmental comments are negative, the taint can be very damaging. They must be involved to be fully up to speed on a situation, which is essential to submitting quality comments. It is much easier to sit back and criticize than it is to get involved and structure workable solutions. EPA was not involved in our EIS, but it submitted a comment letter anyway. The comment read as if it had been prepared by an environmental group, and it included issues beyond EPA's area of expertise. This type of activism must stop.

7. *Prevent Automatic Stay Pending Appeal.* We are concerned that DOI, IBLA or BLM may approve an automatic stay provision in its appeal procedure, as currently proposed by IBLA. If this is approved, we would still be delayed as if the EIS were never completed. Anyone with 32 cents could block development indefinitely without showing first that they were likely to succeed on the merits of the appeal. It may be appropriate to stop such efforts through legislation.

8. *Increase Budget.* Part of the problems we have seen are the result of having too few people with too little time to work on projects like our EIS. Budget increases may help, particularly where the funds are dedicated for problem areas.

---

STATEMENT OF DAN CHU, WYOMING WILDLIFE FEDERATION, EXECUTIVE DIRECTOR

Good Afternoon, Chairman and members of the House Resource Committee, my name is Dan Chu and I am the Executive Director for the Wyoming Wildlife Federation (WWF). WWF is a non profit conservation organization composed of over 3000 members who are united by a deep commitment to the protection of wildlife habitat, the perpetuation of quality hunting and fishing, and the protection of their right to use and enjoy public lands. Today, I will provide our perspective on the function and effectiveness of the National Environmental Policy Act (NEPA). NEPA was established in 1970 to guide Federal agencies in their efforts to manage for sustainable development and to allow the public to be involved in the management of their lands and resources. Our members directly benefit from NEPA because it provides a forum for local people and local interests to be considered in Federal actions on public lands. WWF educates and mobilizes citizens to be involved in decisions that affect their public land throughout Wyoming. We view NEPA as providing Federal agencies a formal process for responding to the public and determining if an action is truly in the public's interest.

Specifically, the central mandate of NEPA is *"The Congress . . . declares that it is the continuing policy of the Federal Government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."*

WWF believes that the purposes of NEPA is to establish the policy that all Federal agencies must:

- (1) Be responsible to future generations
- (2) Provide environmental equity for all Americans
- (3) Allow for the beneficial use of the environment without undue degradation
- (4) Encourage historical, cultural, and biological diversity, and individual liberty
- (5) Promote widespread prosperity for all Americans
- (6) Manage for the conservation and prudent use of our natural resources
- (7) Consider and incorporate public comments and interests

NEPA does not have decision-making authority; rather its function is to provide a framework for disclosure and sound planning. NEPA requires that Federal agencies provide the public with full and adequate disclosure of impacts and effects of development. Such effects include ecological, aesthetic, historic, cultural, economic

or health. To determine the true impacts of development an adequate cumulative impacts analysis must be conducted. Ultimately, a good cumulative impacts analysis can ensure; the orderly development of our public natural resources in a way that is compatible with other resource users under a multiple use management mandate.

Although we believe that the NEPA is an example of great foresight and responsibility from Congress in 1970, we also feel that the implementation of this Act can be improved and streamlined. In fact, the topic of improving and streamlining the implementation of NEPA was a major topic of discussion for the Green River Basin Advisory Committee (GRBAC).

In 1996–97, I served as a member of this Federal Advisory Council. In response to a growing number of concerns and appeals surrounding the cumulative impacts from proposed oil and gas development on Federal public lands in Wyoming and Colorado, both oil and gas companies and environmental organizations asked Secretary of the Interior, Bruce Babbitt to initiate a formal process to help resolve conflicts. Secretary Babbitt formed the Green River Basin Advisory Committee (GRBAC) in February 1996 under the Federal Advisory Council Act. The GRBAC was given a one-year charter to ensure the reasonable development of natural gas and oil while protecting environmental and other resource values on public lands in Southwest Wyoming and Northwest Colorado. Secretary Babbitt, in cooperation with the states, selected 16 members from the oil and gas industry, conservation groups, State Game and Fish, county commissioners, and state government officials. The GRBAC was a consensus group and any recommendations forwarded to the Secretary received the wholehearted support of ALL of the GRBAC members. This was truly a remarkable effort in true consensus building, bringing together a wide variety of interests and people to reach agreement on those actions that the Department of Interior could take to resolve existing resource conflicts on our public lands.

One of the issues we agreed to discuss was the use of the National Environmental Policy Act (NEPA). After much discussion we reached consensus on some recommendations we felt could improve the implementation of NEPA in the process of oil and gas development.

I would like to briefly point out some of the recommendations the GRBAC reached full consensus on. For more detail, please refer to the *GRBAC's Final Report to the Secretary of the Interior, February 3, 1997 NEPA Streamlining Recommendations*.

One of the common issues of concern we discussed was the lack of interagency coordination in the NEPA process. We recommended “*improving coordination and communication among project proponents, affected agencies and stakeholders to reduce adverse comments and time required.*” Specifically we all saw a need for Federal agencies to improve interagency coordination prior to and during the NEPA process. We all felt that there have been too many instances where one particular development project has resulted in two or more NEPA documents initiated by different Federal agencies. Such a lack of coordination results in unnecessary delays and an inadequate cumulative impacts analysis.

One complaint we hear from industry is that the NEPA process results in significant delays. Many of these delays result from a lack of accurate field data detailing the status of existing wildlife and plant communities. We also recognized that industry and environmentalists alike are frustrated with the incompatibility of various Federal agency data bases, often precluding the sharing of key biological data.

Another GRBAC consensus recommendation addressed how to improve the format and content of the NEPA document while reducing its size. One way is to “*eliminate duplication in data requirements as well as consolidating and accessing existing data bases.*” To this end, WWF recommends that Congress provide additional funding to Federal agencies with the purpose of consolidating various data bases to provide accurate and comprehensive biological data bases.

“*Impact Analysis should be based on scientific and realistic Impact assessment, not speculations.*” This GRBAC recommendation states that a common need of industry, environmentalists and management agencies is that of having a reliable and complete biological data base. Whereas industry strongly believes that it is not their responsibility to collect baseline data, Federal agencies have a legal and moral responsibility to the public to conduct a cumulative effect analysis and minimize impacts of the proposed development on other users and resources. We believe the fundamental problem resides in the inadequate funding of data collection and habitat protection by Congress. For this reason, WWF supports the Teaming With Wildlife Initiative (TWW). We believe that TWW could bring sorely needed funds to state Game and Fish agencies to conduct surveys and compile the necessary information needed in many NEPA documents. Such work would help fill important baseline data gaps as well as enhance wildlife habitat on public lands. Additionally, such preventative monitoring and mitigation could decrease NEPA documentation time and minimize future impacts from development.

In conclusion, WWF applauds the great foresight and wisdom of Congress when they established the National Environmental Policy Act in 1970. Consolidating Federal agency data bases, improving interagency coordination, investing in filling crucial biological and cultural data gaps, and facilitating early communication between all resource user interest groups can enhance the implementation of NEPA.

Thank you for this opportunity to comment.

---

STATEMENT OF LYNTON K. CALDWELL, PROFESSOR OF PUBLIC AND ENVIRONMENTAL AFFAIRS, INDIANA UNIVERSITY AND STAFF CONSULTANT TO THE SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS ON A NATIONAL POLICY FOR THE ENVIRONMENT, 1968–1970

Few statutes of the United States are intrinsically more important and less understood than is the National Environmental Policy Act of 1969. This comprehensive legislation, the first of its kind to be adopted by any national government, and now widely emulated throughout the world, has achieved notable results, yet its basic intent has yet to be fully achieved. Its purpose and declared principles have not yet been thoroughly internalized in the assumptions and practices of American government. Nevertheless there appears to be a growing consensus among the American people that environmental quality is an enduring public value, and that development of the economy does not require a trade-off between environmental quality and economic well-being. Voluntary compliance with NEPA principles may one day become standard policy and procedure for government and business; but meanwhile it is in the interest of the Congress and the Nation to understand the historical developments that led to NEPA and the subsequent course of its implementation.

The legislative history of NEPA and the policy concepts it declares are more extensive and accessible than some of its critics recognize. Treating NEPA as if it were a special application of the Administrative Procedures Act of 1946 misreads its principal purpose and misdirects criticism. NEPA declares public values and directs policy; but it is not “regulatory” in the ordinary sense. A decade of thought, advocacy, and negotiation in and out of Congress preceded the legislation of 1969. Dissatisfaction with NEPA and its implementing institution—the Council on Environmental Quality—should not be directed against this innovative and well-considered statute, but rather toward failure to understand its purpose, to reinforce its administration, or to support its intent.

Through the judicially enforceable process of impact analysis, NEPA has significantly modified the environmental behavior of Federal agencies, and indirectly of State and local governments and private undertakings. Relative to many other statutory policies NEPA must be accounted an important success. But implementation of the substantive principles of national policy declared in NEPA requires a degree of political will, not yet evident in the Congress or the White House. That the American people clearly supports the purpose of NEPA is evident in repeated polls of public opinion. But implementation of NEPA has not been audibly demanded by a public at-large which has received little help in understanding what must be done to achieve objectives of which they approve.

Three decades since 1969 is a very short time for a new aspect of public policy—the environment—to attain the importance and priority accorded such century-old concerns as taxation, defense, education, civil liberties, and the economy. The goals declared in NEPA are as valid today as they were in 1969. Indeed perhaps more so as the Earth and its biosphere are stressed by human demands to a degree that has no precedent. (Note the 1993 World Scientists Warning to Humanity) But “environment” in its full dimensions is not easily comprehended. Human perceptions are culturally and physically limited, but science has been extending environmental horizons from the cosmic to the microcosmic. Even so, the word “environment” does not yet carry to most people the scope, complexity, or dynamic of its true dimensions.

If NEPA continues to be interpreted narrowly and exclusively by the courts, more compelling legislation may be required. A statutory or constitutional amendment may be necessary to give its substantive intent, operational legal status. Some defenders of NEPA fear that opening the statute to textual amendment might result in its being weakened as, for example, through statutory exclusions limiting class action suits based on NEPA, or in limiting its applicability to Federal action having an environmental impact beyond U.S. territorial limits. Its text unchanged, NEPA has already in effect been amended to exclude its application to major environment-affecting projects popular with the Congress, (e.g. the Alaska oil pipeline). As of 1997 the U.S. Code listed at least 28 exceptions to the application of NEPA. Some were for clarification, however, and did not significantly affect the substance of the

Act. An amendment to the United States Constitution could strengthen the applicability of NEPA's substantive provisions to judicial review and executive implementation. At present this possibility appears to lack feasibility, but merits consideration as a future option. Meanwhile, for the NEPA intent to be more fully achieved two developments will be necessary:

**First** is greatly increased popular comprehension of the purpose and principles of environmental policy as expressed in NEPA—especially by conservation and environmental groups, civic organizations, religious denominations, and by political parties at the grass roots, along with recognition—now beginning to appear in the world of business—that economic and environmental objectives need not be incompatible. NEPA principles, if rationally applied, would help sustain the future health of both the economy and the environment.

**Second** is appreciation by the Congress, the executive branch, the courts, and the news media of the political responsibilities and institutional arrangements necessary to fulfill the NEPA mandate. More visible commitments in the White House and at the top policy levels of the Federal agencies, and especially in the Congress are needed. As long as candidates for Federal office are dependent on financing from sources whose purposes could result in destructive exploitation of the environment, support for NEPA in the Congress and the White House is unlikely to be no more than symbolic, and seldom invoked.

NEPA, however, contains means to achieve its purpose. Institutional arrangements for coordination of policies for natural resources and, by implication, the environment, underwent extensive consultations for at least a decade preceding NEPA, within and between both houses of Congress, with the Federal agencies, and with non-governmental representatives of public interests. NEPA incorporated most of the provisions upon which general agreement had been reached.

#### *Declaration of National Policy*

The most important and least appreciated provision of NEPA is the congressional declaration of national policy under Title I, Section 101:

that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Seven specific aspects of policy are enumerated, and while necessarily stated in general terms, they are hardly vague in purpose. Section 101b states that:

- in order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may
- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

In addition the Congress recognized that "each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

The declaration clearly implies that economic and environmental values are or should be compatible. A key to understanding NEPA may be found in the phrase "... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." This statement has often been interpreted to require a balancing of equities, primarily economic and environmental. But the intent of NEPA would not be achieved by off-setting (but still retaining) an economic

“bad” with an environmental “good,” as mitigation measures may attempt. More consistent with the spirit of the Act would be a synthesis in which “productive harmony” is attained and transgenerational equity is protected.

Beneath the language of the Declaration there are fundamental questions of jurisprudence and constitutional responsibility that, bearing upon the implementation of NEPA, have not generally been addressed. Does the Declaration establish a policy by law? If the statute, in fact, is a declaration of law as well as policy what then are the responsibilities of the President under Article II of the Constitution that “he shall take care that the laws be faithfully executed”? And what are the responsibilities of the Congress to see that a policy declared by a Congress and not repealed, is not sabotaged or neglected in the Executive branch or by its own committees?

Critics of NEPA have found its substantive provisions nonjusticiable, and by implication not positive law. The courts have refrained generally from overturning administrative decisions that could be interpreted as incompatible with the substantive provisions of NEPA. However, in the case of *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, Judge Skelly Wright of the U.S. Circuit Court of Appeals of the District of Columbia declared that:

The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it can be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors, conducted fully and in good faith, it is the responsibility of the courts to reverse.

The generally recessive posture of the courts on the policy provisions of NEPA contrasts markedly with their activist policymaking in constitutional civil and property rights cases. In these cases Federal judges have not hesitated to assert sweeping jurisdiction over all levels of government in which official action or inaction was found to be at variance with judicial opinion. A plausible explanation for this contrast is the absence of any direct provision in the Constitution of the United States for environmental protection, in contrast to explicit provisions for property rights and civil rights in the Fifth and Fourteenth Amendments. Where the Congress has mandated or prohibited specific actions affecting air and water pollution or endangered species, and provided penalties for violations, the courts have reviewed and enforced if no infringement of constitutional rights is found. Presumably they would do so for any of NEPA's substantive policy mandates for which Congress provided specific procedures and penalties not subject to judicial reversal as contrary to the Constitution.

An environmental protection amendment to the Constitution might enable the courts to clarify equities and diminish uncertainties between private rights and public interests in the environment. It could reduce litigation in environmental affairs and might prevent some arbitrary and unpredictable policymaking on environmental issues by the Federal courts. Section 101 of NEPA establishes the principles and goals of environmental policy and is, in essence, a declaration of values. It is difficult to adjudicate values, but legislation implementing principles expressed in NEPA and applied to specific tangible policies has been reviewed and upheld in the courts. The Historic Preservation Act (Public Law 89-665, Oct. 15, 1966) and the Endangered Species Act (Public Law 93-205, Dec. 28, 1973) are examples. Substantive mandates in these and other environmental statutes are or could be reinforced by the substantive and procedural provisions of NEPA.

Beyond the judiciary there is another recourse to enforcement of the principles of NEPA—in the constitutional obligation of the President “to take care that the laws be faithfully executed.” The President rarely needs a court opinion to use residual executive power to apply the law; the presidency possesses broad executive discretion over implementation of the laws by the Federal agencies. A President whose priorities coincided with NEPA's principles, absent blocking in the Congress or the courts, could by executive action go a long way toward fulfilling the NEPA mandates.

#### *The Case For a National Policy*

From the viewpoint of historical constitutional conservatism, environment in the broad sense was not a comprehensible subject for public policy—at least for national policy. Strict constitutional constructionist Thomas Jefferson did not even believe that highway construction was an appropriate function of the Federal Government. For environmental nuisances, such as air or water pollution, common law remedies were available under state police powers, and prior to the 1960's were widely regarded as local issues.

Emergence of environment as a public and national issue followed from profound changes in the population and economy of the United States in the course of the

20th century. These changes were accompanied by unprecedented growth of scientific knowledge and technology. Progress of this new industrial society increasingly encountered and created environmental problems which neither local government or the market economy could cope. Quality of life values in health, amenities, and opportunities were being lost or threatened and the causes transcended artificial political jurisdictions.

Only the Federal Government had the geographic scope and institutional structure able to deal with the growing array of interrelating problems now called "environmental." These problems of air, water, resource conservation and the biosphere were soon seen to be transnational, but national government was the only available institution sufficiently inclusive and authoritative to deal with them. International cooperation depended upon the ability and willingness of national governments to address common regional and global environmental problems and so by the mid 20th century, environment began to emerge as a new focus for public policy.

Broad statements of policy and principle that are not perceived to affect personal interests or property rights seldom arouse much public concern or response. Issues that do elicit popular concern almost always affect the present and personal advantages or apprehensions of people. Attitudes relating to the environment in modern American society have been largely issue-specific and subjective, as in the NIMBY (Not in My Back Yard) syndrome. But effective response to circumstances in the larger societal and biospheric environments necessarily must be collective, with whole communities or an organized "critical mass" of the society activated. Stratospheric ozone depletion, global climate change or tropical deforestation are hardly neighborhood or personal issues which people might feel that their actions could influence. And while non-governmental organizations may help in many ways to assist environmental protection, the ultimate agent of public interests affecting all of the United States is the Federal Government. State and county boundaries are environmentally artificial, corresponding neither to ecosystems nor bioregions, and seldom to economic activities that are increasingly interstate, nationwide, and transnational in scope.

NEPA, supplementing the legislative powers of the Federal Government over interstate commerce, navigable waters, and public lands, creates an obligation to apply its provisions where relevant. Thus applications for Federal permits, licenses, purchases, concessions, and grants may require the preparation of environmental impact assessments required by NEPA. For other environmental impacting policies the President, through Executive Orders, may instruct the agencies in the performance of their functions, as President Carter did in giving legal status to the NEPA Regulations of the CEQ, (EO11991, 24 May 1977) and, paralleling NEPA in Federal activities abroad, in EO12114, 4 January 1979.

### *Conclusion*

NEPA is potentially a powerful statute, well integrated, internally consistent, and flexible, even though not entirely clear on some points of law which have nevertheless been clarified by interpretation, as in the Regulations issued by the CEQ under Executive Order 11991 of 1977. That it has made a significant difference in the United States and has influenced governments abroad is hardly debatable. NEPA was not a sudden inspiration, nor was it put over on an unsuspecting Congress and the public by an environmental lobby. Its purpose was never the writing of impact statements; but this action-forcing procedure has been a great inducement to ecological rationality in Federal actions which traditionally had largely ignored environmental consequences.

No technical fix nor administrative reorganization will achieve the NEPA intent. To implement NEPA as intended requires a president committed to its objectives and using his appointive, budgetary and leadership powers to this end. It requires a judiciary that recognizes the legislative history and substantive intent of the statute and does not defeat the purpose of successive Congresses through narrow legalistic interpretations. It requires from Members of the Congress recognition of the legislative history and intent of NEPA and of the efforts of successive Congresses since 1959 to respond to concerns of the American people for a sustainable and harmonious environmental future.

Legislative priorities may change with voting majorities (even by one vote) in successive Congresses. But the printed record of the history of NEPA should make clear the intentions of its architects in the 91st and preceding Congresses. Nevertheless many critics of NEPA appear to have interpreted it from subjective premises without inquiry into the legislative history of the Act or into the assumptions and expectations of the persons responsible for its language and content. These critics have missed the implications of NEPA's broad and basic principles and goals. It sets an agenda to be implemented through legislative and administrative action. From one

perspective NEPA may be seen as the capstone of national environmental policy; more importantly it should be viewed as a foundation for the future.

---

STATEMENT OF LILLIAN C. BORRONE, DIRECTOR, PORT COMMERCE DEPARTMENT, THE  
PORT AUTHORITY OF NEW YORK & NEW JERSEY

Dear Congressmen Saxton and Pallone:

The occasion of the House Resources Committee hearing on matters pertaining to the National Environmental Policy Act prompts me to share some thoughts on Federal management of environmental policy as it regards dredging activities in the Port of New York–New Jersey. As you know the Port was in crisis through the first 6 years of the 1990's. Ships had trouble entering marine terminal areas; cargo was lost to the competition in Canada. However, the tide has changed. The Port community became energized as did the New Jersey and New York congressional delegations. And initiatives were taken by the Governors of New York and New Jersey and the Clinton Administration, especially with respect to coordination among the Federal regulatory agencies.

The Port of New York–New Jersey is the largest on the East Coast of the American continent, an international gateway of national economic significance and a major economic engine for the States of New York and New Jersey. The Port is dependent on channel, berth and anchorage dredging to maintain adequate depths for the many thousands of ships that call each year. Approximately 4 million cubic yards of sand and mud are dredged annually. In addition ours is a region with superb, coastal natural resources that are on display in your congressional districts and in the Port itself. Perhaps not surprisingly the region has been witness to especially vigorous environmental regulation—and litigation—of water-based activities including navigational dredging. That intense interest is prompted in part by sediment contamination that is the result of upstream sources of pollution and the region's industrial heritage. It raised legitimate questions within government and attracted well-intentioned—sometimes constructive—critics of dredging practices. All those ingredients combined to produce a crisis of the like the Port had not seen in my memory. For the purposes of this letter I would like to focus on the Federal regulatory function, complicated as it was by sediment contamination.

The Army Corps of Engineers is the Federal Government's permitting agency for dredging activities. However the natural resource agencies—EPA, NOAA's National Marine Fisheries Service and Interior's Fish & Wildlife Service—also play influential parts. When the Federal process was not functioning well often times the agencies were conducting their respective roles less in ways that facilitated decision-making and more as gatekeepers. Each had their own demands and seemed to have little regard for the passing of time and the practical implications of regulatory delay on the Port. Typically cautious and methodical in the performance of their duties, they became especially so with the knowable that some environmental orations were prepared to litigate.

The Port's only sediment disposal location at that time was the EPA-regulated ocean Mud Dump site. As a result, there were no available alternative disposal areas and sediments were subjected to the most rigorous testing requirements under the law. Revised and tougher Federal testing protocols were put in place at the beginning of the decade and certain of those were never fully accepted in the Port community as scientifically supportable. The presence of dioxin and other contaminants in sediments, especially in the busiest part of the Port where channels and berths were overdue for dredging, produced frustrating and not always clear results on which the regulators were to base their decisions. A nearly three-year period of regulatory indecision and, eventually, litigation is documented in the attached. Ultimately, the Federal and state permitting agencies and the court allowed dredging to go forward, notwithstanding a lawsuit, the effects of which are still felt today. And while the permit was issued and the channel was dredged in the summer of 1993 Federal permit problems persisted. Challenges to dredging activities in New York Harbor continued to stymie Federal channel dredging well into 1996.

The positive news out of all of this is that steps were taken to address the various problems in the States and in Washington, particularly with respect to Federal regulation. There were two developments of special note regarding the latter. I will touch briefly on the first and then for the purposes of your Committee hearing focus on the second, involving the work of the Council on Environmental Quality under NEPA.

Importantly, dredging came to be understood as a transportation matter with some attendant environmental issues, and not vice versa. In 1993, then Transportation Secretary Federico Peña recognized that major channel dredging projects



were at risk and convened the Interagency Working Group on the Dredging Process whose members were the regulatory agencies and the Maritime Administration. Late in 1994, its report, *The Dredging Process in the US: An Action Plan for Improvement*, was issued and later forwarded to the White House. It included recommendations that focused on ways the permit process could be expedited through greater cooperation among the regulatory agencies. Today, the Corps of Engineers and EPA co-chair the National Dredging Team that, along with Regional Dredging Teams in ports around the country, is working to improve the way the dredging permit process is implemented.

A second and significant step to improve regulatory decision-making and overcome major hurdles to dredging was the involvement of the Council on Environmental Quality. Administration officials came to understand that certain persistent issues caused great uncertainty in what should be predictable and routine dredging activities. It became apparent that the Port would continue to lose intermodal cargo and jobs to Canadian ports—at a rate of roughly 100,000 containers a year—if the Federal channels were not able to be dredged promptly. Already large ships that routinely made New York Harbor their first call in North America were diverted to Halifax to lighten their load of containers before sailing to our Port.

After spending over a year consulting with many persons representing the States, the Port, marine terminal operators, labor, and environmental organizations, CEQ and the Federal agencies developed a strategy designed to address specific needs of the Port, including the dilemma over sediment disposal; the immediate need to clear Federal channels and berths of accumulated silts; and the long term question of the future of the Port channel structure. On July 24, 1996 Vice President Gore announced a three-pronged strategy as outlined in a letter to members of the Port's congressional delegation. It was a strategy, the components of which were not pleasing to all interests, that served to get the Port past seemingly intractable issues.

First, in coordination with the States, the controversial ocean disposal site—the Mud Dump—was to be closed in September of the following year to all but Category 1 sediments (the cleanest of 3 categories as determined through sediment testing). The nearly century-old site was to be capped. Second, prompt steps were to be taken to remove “immediate obstacles to dredging the Port,” with a focus on the permit process, and the Corps would accomplish maintenance dredging for “10 high priority” Federal channel projects by the end of 1997. Those were selected in cooperation with the States and the Port Authority. Third, the Corps would undertake an “expedited” feasibility study of alternatives for a 50-foot deep Port. In addition the Maritime Administration was to recommend any additional measures needed to “enhance the international competitiveness” of East Coast ports. Steps also were to be taken to address the quality of sediments in the Port. The letter, signed by the Secretary of the Army, the Secretary of Transportation, and the Administrator of EPA, is attached.

Significantly, the White House and agencies did not simply declare victory and move on to another crisis in another part of the country. Implementation of the July 1996 strategy was carefully monitored and managed by CEQ, Corps and EPA headquarters staff. Not unexpectedly, problems with some permits and other issues did appear along the way. Those were managed with great diligence and conscientiousness and interested parties at all levels were consulted and heard. In our experience the coordination role played by CEQ as contemplated in NEPA was essential to our success by ensuring that conflicts and obstacles among agencies are addressed by the Executive Office of the President. As a result we were able to overcome years of gridlock—or mudlock—and move forward to protect the future of the Port.

The Port is not out of the woods yet. We are working with the States of New York and New Jersey and the Corps of Engineers to implement a long term and economic dredged sediment disposal strategy. Sediment contamination in some parts of the Port continues to pose permitting and disposal issues. Meanwhile, essential dredging has occurred or is planned, construction should start on a major channel deepening project this September, and funding for the 50-foot feasibility study is on schedule. Such progress is made possible by long term commitments on the part of everyone involved. At the Federal level, the Council on Environmental Quality, Corps of Engineers, and EPA officials continue to show that commitment. And with the strong support of our Governors the Port's future looks much brighter than it did just a few years ago.

STATEMENT OF CAROLE BROWNER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FEDERICO F. PEÑA, SECRETARY, U.S. DEPARTMENT OF TRANSPORTATION AND TOGO D. WEST, JR., SECRETARY, U.S. DEPARTMENT OF THE ARMY

Dear Congressman Pallone:

Your leadership and support have been essential in advancing our shared goals of protecting the ocean environment, while ensuring the competitiveness of the Port of New York and New Jersey and the economic health of the region. We are writing to announce our commitment to several substantial new steps to provide additional Administration support for those goals. We believe the three-point plan outlined below demonstrates this Administration's commitment to the continued growth and vitality of the port, to protective regulation of ocean disposal, and to a stronger partnership with the states in protecting regional commerce and the marine environment.

*1. We will close the Mud Dump Site by September 1, 1997*

After years of contention, this Administration is prepared to help resolve the controversy over disposal at the Mud Dump Site (MDS) off the New Jersey coast.

Environmental, tourism, fishing, and other community groups have long contended that the MDS should be closed immediately. These views reflect the important environmental values that New Jersey's communities identify with their coastal environment. Community concerns have been heightened by the unhappy history of other environmental threats that these communities have had to endure—ranging from oil spills to the littering of shorelines with medical waste. This history warrants sensitivity to concerns about the MDS, including concerns about continued use of the site for so-called "category 2" material. When these concerns are coupled with the limited category 2 disposal capacity we expect the site to provide, we must conclude that long-term use of this site for disposal activity is not realistic.

Accordingly, the Environmental Protection Agency (EPA) will immediately begin the administrative process for closure of the MDS by September 1, 1997. The proposed closure shall be finalized no later than that date. Post-closure use of the site would be limited, consistent with the management standards in 40 C.F.R. Section 228.11(c). Simultaneous with closure of the MDS, the site and surrounding areas that have been used historically as disposal sites for contaminated material will be redesignated under 40 C.F.R. Section 228 as the Historic Area Remediation Site. This designation will include a proposal that the site be managed to reduce impacts at the site to acceptable levels (in accordance with 40 C.F.R. Section 228.11(c)). The Historic Area Remediation Site will be remediated with uncontaminated dredged material (i.e. dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation). Our ongoing environmental assessment activities at the site will be modified to reflect these new commitments. We also will seek to reinforce this approach in appropriate legislation.

Although we recognize that eventual closure of the MDS, followed by remediation, is appropriate, immediate closure could jeopardize the Port, which may need short-term use of the site to dispose of category 2 material. To strike the appropriate balance, use of the site for category 2 material will have to be supported with certifications by the permit applicant, and a finding by the Corps of Engineers that: 1) the affected states or ports were asked to provide alternative sites for disposal of the material identified by the permit, and that the states or ports failed to provide a reasonable alternative site; and 2) the disposal of category 2 material at the MDS will not increase the elevation at the MDS higher than 65 feet below the surface. Any elevation limits will be designed to contain material within the current lateral limits of the MDS, and will be set based on scientific evidence.

*2. We will help remove the immediate obstacles to dredging the Port*

The Port Authority of New York and New Jersey, terminal operators, shipping lines, and labor groups have identified numerous ways in which we can help expedite dredging in the Port. We have heard, and are responding to, their concerns.

Making the MDS available for category 2 material for the next 12 months, and allowing the elevation at the site for category 2 material to increase, would remove the most immediate and major Federal obstacles to dredging. The designation of the Historic Area Remediation Site will assure long-term use of category 1 dredge material.

Our outreach to the companies, longshoremen, harbor pilots, and others whose livelihood depends on the Port, has identified many additional steps our agencies can take to further facilitate adequate dredging in the Port. A major source of concern and potential cost for permit applicants has been uncertainty surrounding the testing that must support permit applications. Accordingly, by the end of August,

EPA will finalize its proposal that tests of only two species, not three, will be required of permit applicants. EPA then will invest at least 9 months in a process for all affected groups—industry, labor, and environmental groups—to help the Agency review the ocean disposal testing requirements and ensure that any further revision reflects both sound policy and sound science.

The Corps of Engineers will expedite the processing of dredging permit applications and completion of its own dredging projects. The Corps will issue public notices for dredging permits within 15 days after a completed application is submitted, or will have requested any additional information necessary to make the application complete. Within 90 days, the Corps will either issue the permit, deny the permit, or commit in writing to a deadline for the permit decision. The Corps responsibility for the Federal channels will also be met with cooperation from the states and the funding requested by the President, the Corps will ensure maintenance dredging for 10 high-priority Federal channel projects before the end of 1997.

In addition, the Corps and EPA will accelerate their work with the affected state and local governments on a sound dredge material management plan, and complete the interim plan by August 30, 1996. This interim plan will identify any steps that are necessary to sustain dredging through 1997. The final plan will be completed by September, 1998.

Most importantly, we expect that our commitments concerning the MDS will diminish or eliminate the possibility of litigation challenging permits and the EPA rule change during the period prior to September 1, 1997. This proposal is predicated on that result.

### *3. We will help ensure the health of the Port and the environment for the 21st Century*

The short-term efforts identified here cannot truly help the Port without effective long-term strategies to ensure that dredge material is managed properly. We recognize the significant efforts and commitments that New York and New Jersey have made with us to put those strategies in place. We will reinforce those efforts, so that long-term growth of the Port is sustained and sustainable.

Recognizing that a vital Port should be able to accommodate the full range of world-class ships, the Corps will soon begin an expedited feasibility study of alternatives for a 50 foot deep Port, including recent legislative proposals on this issue. The Corps will seek Congressional authorization and take steps to reprogram funds to allow the study to begin in 1996, and the study will be designed for completion in 1999. Recognizing that dredging is not the only issue affecting the future of this and other Ports, the Department of Transportation is committed to a six-month study of the causes of cargo diversion from our East Coast ports. This study, which will be developed in consultation with other affected agencies, will recommend any additional measures that are needed to enhance the international competitiveness of our East Coast ports.

Continued growth of the Port must be coupled with aggressive development of disposal alternatives and expanded efforts to reduce toxic pollution in the harbor. The Administration will continue to support legislation and appropriations to support cost-sharing of upland disposal alternatives. The Administration will also seek support for the range of continuing efforts to develop acceptable alternatives. For example, EPA is today announcing \$1.2 million in contract awards to support development of decontamination technologies for dredge material. In addition, the Corps will immediately seek necessary authorization and funding to begin the technical design and feasibility studies needed for environmentally sound confined containment facilities, in anticipation that such facilities may be part of the final dredge material management plan. We also will pursue additional steps to reduce and address toxic pollution in the estuary. We will seek to minimize polluted runoff by funding and supporting local and region-wide watershed planning and implementation activities. By September 1996, EPA will invest \$100,000 to facilitate pollution reduction in the Arthur Kill. All of these efforts will be coordinated with the Harbor-Estuary Comprehensive Conservation and Management Plan, which is the blueprint for working cooperatively with state and local governments, businesses, and citizens to reduce toxic pollution in the watershed.

We will be calling upon every member of the New Jersey and New York delegations, as well as the affected state and local governments, to continue our constructive and cooperative efforts to sustain port growth and environmental protection. We will also be submitting periodic reports to the President on our success in implementing this plan and on any continuing obstacles to harbor dredging.

We appreciate your continuing leadership and advice as we work together to ensure a healthy economy and a healthy environment for the region.

## STATEMENT OF ROCKY MOUNTAIN OIL &amp; GAS ASSOCIATION

## INTRODUCTION

The Rocky Mountain Oil & Gas Association (RMOGA) is a trade association representing hundreds of members, both large and small, who account for more than 90 percent of the oil and gas leasing, exploration, and development in an eight-state region in the Rocky Mountain West. Over 90 percent of the Federal lands lie in the western third of the United States. As such, most RMOGA states contain significant amounts of Federal acreage. Consequently, RMOGA's members routinely obtain Federal oil and gas leases and conduct exploration and development activities throughout these public lands. All of these actions are subject to compliance with NEPA.

NEPA, enacted by Congress in 1969, is a procedural Act designed to ensure the Federal Government considers the environmental consequences of all major Federal actions prior to making decisions on whether certain activities will be allowed to proceed. The Act also directs that broad public involvement be an integral part of the analysis process. Upon passage of NEPA, the Council on Environmental Quality (CEQ) developed regulations for implementing the Act's procedural provisions. The CEQ regulations attempted to develop a reasonable approach to NEPA compliance and have been modified since their inception to take into account the need for streamlining the process to avoid unnecessary delays or analysis.

However, while RMOGA firmly believes no statutory changes are needed to "fix" NEPA itself or its implementing regulations, there are many problems associated with the Federal agencies' interpretation of NEPA and implementation of CEQ's regulatory requirements. Moreover, even though land management agency manuals plainly recognize the intent of the law and regulations and have set forth procedures accordingly, actual NEPA compliance by these agencies often flagrantly ignores the intent of the law and regulations.

For example, the CEQ regulations direct agencies to reduce paperwork by keeping the length of environmental impact statements (EIS's) short by preparing "analytic rather than encyclopedic" EIS's; limiting issue analysis to only significant issues, while briefly describing insignificant issues; and utilizing tiering, adoption or incorporation by reference of relevant documents to eliminate duplication and unnecessary analysis. Comparable direction is aimed at reducing delays by emphasizing interagency cooperation before beginning preparation of the EIS, recommending the establishment of time limits for EIS preparation, and utilizing categorical exclusions and "findings of no significant impact" when an action not otherwise excluded will not significantly effect the human environment. None of the Federal agencies adhere to these or other CEQ directions. As a result, the EIS process is overly long, complex, and extremely costly. In fact, it would appear the process is also used to delay proposed projects in the hope proponents will abandon their projects. An unfortunate outcome, due to excessive costs, delays, and uncertainty associated with NEPA, is that companies are reluctant to invest their capital in projects on public lands and end up avoiding Federal lands altogether, where possible.

The first step in remedying this onerous situation is clear—require Federal land management agencies to immediately implement the *NEPA Streamlining Recommendations* developed by the Green River Basin Advisory Committee (GRBAC) in June 1996. GRBAC was convened by Interior Secretary Babbitt and was comprised of environmental, oil and gas industry, private land owners, state and local government representatives, as well as several *ex-officio* members from the BLM, Forest Service and DOE. One of GRBAC's self-appointed tasks was to assess the myriad problems associated with the NEPA process, the impetus being perceived conflicts between natural gas development in southwest Wyoming/northwest Colorado and wildlife concerns. As a result, the Committee identified many flaws in the current NEPA process and developed a set of specific recommendations aimed at solving the problems. The Committee's findings are relevant to all NEPA endeavors and the recommendations should be applied to *all* NEPA projects, whether they are at a site-specific project or programmatic level, including Federal land use planning.

Even though the Department of Interior committed to formally adopting these recommendations, no specific guidance or direction has been issued to BLM field offices. And, while BLM named a pilot project, the Jonah II project in Wyoming, to test the validity of the GRBAC recommendations, the project failed because the recommendations were not implemented by the Federal agencies involved in the project. As a solution to this dilemma, we urge the House Resources Committee to pass a resolution calling for DOI and DOA adoption of the GRBAC recommendations. We also recommend the Committee require an annual report from both BLM and the Forest Service showing progress made in streamlining their NEPA processes.

**Other specific issues and solutions RMOGA would like to emphasize are identified in the following discussions:**

*Revise Agency NEPA Procedures To Ensure Consistency With CEQ Regulations*

Over the past two decades, Federal land management agencies have become less effective as land managers due to litigation by preservation groups. For example, they have routinely elected to prepare full blown EIS's on projects which could have been sufficiently addressed by either a categorical exclusion from NEPA or an environmental assessment. This misguided attempt to prepare "bulletproof" documents has resulted in protracted delays due to inordinate analysis requirements and increased costs in the NEPA process. In addition, agencies are relying less on trained resource specialists to make everyday land use decisions. As mentioned previously in this statement, the CEQ regulations offer a variety of options for ensuring the NEPA process is effective but not excessive. The agencies should more clearly incorporate this direction into their own procedures and return land management to resource professionals.

*Institute Federal Agency Accountability in the NEPA Process*

The greatest cause for delay and excessive costs associated with the NEPA process is the agencies' insatiable demand for new resource data, particularly when a project proponent is paying for the NEPA documentation in order to have it completed within a reasonable timeframe. NEPA requires that an environmental analysis include only the best *available* information and that if there is a lack of information it should be so stated in the EIS. However, agencies are compelling project proponents to pay for data collection which should have been collected as part of the land use planning process. Some field offices also appear to be analyzing speculative and extraneous alternatives to the proposed action which serves to further complicate the NEPA analysis and to delay projects in which millions of dollars have been invested by proponents.

NEPA delays are not only harmful to the companies that have legally binding contractual agreements with the Federal Government to exercise their lease rights, they also result in delays in revenue going to the Federal, state and local treasuries. It is imperative for these onerous delays to be eliminated. In addition to requiring agency personnel to comply with CEQ regulations, we believe the best way to reduce costs and delays is to hold agency personnel accountable for using the most practical and time and cost effective means to acquire data where gaps exist. Also, cooperative data collection undertakings among Federal agencies and state and local governments should be mandated. Ultimately, these cost and time saving measures should be incorporated into job performance standards of NEPA team leaders, line officers and agency heads.

*Reduce Costs*

Due apparently to increasing budget shortfalls, as mentioned above agencies are increasingly shifting the financial burden of project level NEPA compliance to industry for the plant and animal inventories, surveys and documentation. Unfortunately, this cost shifting trend also precludes many independent petroleum companies from operating on Federal lands and is becoming a principal cost constraint for larger operators. Partial relief may be accomplished by adoption of an Eco-Royalty Relief (ERR) program, as recommended by GRBAC. As proposed, ERR would allow industry to take credit against royalty payments for the cost of project NEPA documentation and mitigation/monitoring activities which exceed lease and regulatory requirements. ERR is supported by environmental Groups, the state of Wyoming, the public and industry.

Furthermore, GRBAC's NEPA streamlining recommendations include ERR as a critical streamlining element because it could help resolve controversial issues early, provide a means for gathering sound scientific data to accurately assess potential impacts and mitigation. A DOE analysis in the GRBAC report indicates application of ERR would be *revenue positive* by accelerating royalty payments to Federal, state and local governments.

*Establish Time Frames*

Time frames associated with project level NEPA analyses have become intolerable. Two to 4 years to obtain project approval on existing leases is unconscionable. While we recognize it may be impractical to impose fixed timeframes for completion of all NEPA documents, every effort should be made by the agency to perform within a reasonable schedule, which it can be held to by the project proponent. The GRBAC recommendations target a 50 percent reduction in time and paper which RMOGA believes is feasible if the agencies commit to streamlining the NEPA process. Utilizing options such as tiering, incorporating by reference and adopting exist-

ing information would help agencies reduce their analysis times. RMOGA recommends the agencies be required to track their performance in an annual report to Congress.

#### *Improve Communication and Interagency Coordination*

Improved communication, coordination and resource data exchange among Federal, state and local governments and project proponents will help streamline the NEPA process, both at the project level and the land use planning level. Federal agencies are reluctant to allow local government involvement in the NEPA process, despite the fact they have a vested interest in the decisions being made and can help make the process run more smoothly. On the other hand, one of the most frustrating and controversial aspects of interagency coordination is that many single use agencies fail to recognize Federal land management agencies have a Congressionally mandated multiple-use mandate which cannot be abrogated. Furthermore, issues are often raised that are clearly beyond the scope of the analysis, e.g. global warming. Such input adds tremendous cost, time and controversy to the NEPA process for all parties while contributing little value from the perspectives of science-based decisionmaking, risk management or efficient land management. Clearly the lead Federal agency must take responsibility to ensure the process runs efficiently and cost effectively.

#### *Establish NEPA Coordinators*

Federal agencies should establish a national NEPA coordinator to oversee all NEPA projects within an agency. This coordinator would ensure agency compliance with CEQ regulations and would have actual experience in managing NEPA projects. This position would also help ensure NEPA projects are kept on track and are adequately staffed and funded. To date, there is little or no agency support for NEPA experts. NEPA compliance typically falls to subordinate staff with little or no experience in project management and/or NEPA compliance. Since NEPA compliance constitutes a major responsibility of land management agencies, greater support from all levels of management must be provided.

#### *Avoid Unessential Public Involvement*

Once again, due to fear of litigation, many Federal field offices issue public scoping notices on each and every minor activity proposed on public land, including those which involve previously disturbed areas, such as weed control along an existing access route. This results in unnecessary project delays, not to mention wasted Federal funds. Public notification and requests for comments should be limited to major projects that could result in significant impacts to other resource values or the human environment.

#### *Improve the Scoping Process*

Agencies should limit the NEPA analysis to issues relevant to the project at hand. Agencies typically analyze in great detail insignificant issues simply because they have been raised in public comments. While it is important to identify all *relevant* issues as early as possible in the process, it is irrational to analyze each and every issue raised, particularly if a resource value or conflict does not exist within the study area or if it has already been adequately addressed in another document.

While the CEQ regulations indicate "alternatives" are the heart of the EIS, it is inefficient to analyze every possible alternative that can be contrived. NEPA, itself, indicates only appropriate alternatives needed to address unresolved conflicts are necessary. Therefore, the range of alternatives should be dictated by the nature of the project proposal, including potential mitigation measures, and kept to the minimum needed to provide a method for resolving perceived conflicts.

#### *Improve Monitoring Requirements*

We propose the agencies adopt a procedure for determining when land use activities are approaching the management threshold established in land use plans to ensure resource sustainability and land management continuity. As such, active monitoring must be done on all resource activities. This will allow Federal land management agencies to track key resource issues, improve their resource data bases and obtain a true picture of actual cumulative effects of surface management decisions. In order for this concept to work, the agencies must make monitoring a priority. In addition, a quality control process needs to be put in place to ensure resource management objectives are clearly stated and measurable. Management thresholds, which when reached require a review of existing management practices, must also be identified. An extremely important element of the monitoring effort is maintenance of existing resource data. This effort could be accomplished collectively with other Federal and state agencies. The end result would be a system for resource

management planning which will increase efficiency in the Federal land use planning and project level NEPA processes.

In conclusion, there are many ways in which to improve the NEPA process by revising current agency procedures. While RMOGA believes the risks associated with the legislative process may be unacceptably high on the NEPA issue and that the current framework can be made to work better, we would fully support legislation to implement an Eco-Royalty Relief program to address the currently unbridled costs associated with project level NEPA.

---

STATEMENT OF HON. ALEX PENELAS, MAYOR, MIAMI-DADE COUNTY

In early 1993, President Clinton's administration designated Homestead Air Force Base as "a model for the nation" of fast-track realignment and conversion under the Presidential Five Point Plan. Realignment occurred on 31 March 1994, and reconstruction of the Air Force Reserves cantonment area is proceeding on schedule. However, 4 years later, the "conversion" part of the model (the non-cantonment portion of the base) is still in "analysis paralysis." Specifically, the civilian airport reuse of the base, which was touted as the engine of economic revitalization, lingers in administrative limbo.

The economy of the South Miami-Dade area, dependent for over 50 years on active duty military operations and agriculture, has lost over \$4 billion since realignment. The area's continued economic recession is the biggest single contributor to the persistently high rates of unemployment figures in our county while the remainder of the state and the Nation enjoy sustained prosperity. Clearly, the entire county's economic viability is at stake.

The complicated conversion process of the former Homestead Air Force Base from active duty to a joint civilian-military use facility was to be the engine of economic renewal after Hurricane Andrew's devastation. The process, however, appears to be on an indefinite holding pattern. This is due primarily to the manner in which the Council of Environmental Quality (CEQ) has interpreted a certain key rule in the National Environmental Policy Act (NEPA) of 1969. The rule in question requires the consideration of what is known as the "No-Action Alternative" as part of any Environmental Impact Statement (EIS). Analysis of the No-Action Alternative is very useful for situations involving the development of property at its highest and best use, but the No-Action Alternative is very misleading in the context of redevelopment in situations where, through an unfortunate combination of natural disaster and subsequent lack of maintenance and repair, property slated for redevelopment is, at the time of the EIS, underutilized and/or abandoned. In these circumstances, the No Action Alternative forces the Federal Government to start with a baseline which produces an artificially low level of environmental impacts. This automatically biases the entire process against any type of redevelopment.

We currently face this situation with respect to the Supplemental EIS that has been ordered for the former base. The No-Action Alternative as it exists today disregards the former active duty military operations on the entire 2,940 acres of the property by reducing it to a reserve base with a very low level of military activity along with some ancillary law enforcement uses occupying less than one third of the original acreage. This is dramatically different from the level of activity that the base generated prior to Hurricane Andrew. To use the current artificially low level of activity as the comparative basis for a determination of whether the redevelopment should be allowed, defies sound judgment and harshly impacts South Florida through the potential loss of the valuable resource of the redeveloped use of the base.

This same scenario exists any time a natural disaster, or just programming changes, result in the redevelopment of Federal property after it has become dormant for even a short period of time and therefore should be corrected.

The logical, factual, most equitable solution is to require that the No-Action Alternative be based upon the level of use that the property experienced at its highest level of use in the past. Using this approach, redevelopment of real property that has been allowed to deteriorate for some years would be appropriated based upon the highest level of use that had existed in the past. This method considers the appropriate level of use of properties that were previously developed to their highest and best use while still protecting natural resources requiring continuing evaluation. Using the prior level of activity as the basis for future determinations ensures strict control over the potential for overdevelopment and overexpansion.

I strongly urge you to consider the clarification of this key NEPA interpretation so that the No-Action Alternative reflects the highest level of activity attained prior to it being artificially reduced.

Additionally, I urge that the current status of base contamination levels be accurately and rigorously documented in the SEIS. Restoration and investigation records prove that the base is one of the most environmentally clean in the Nation and that it poses an insignificant level of risk to human health and the area's environment.

During the process of trying to complete the realignment and conversion of the former Homestead Air Force Base to a joint civilian and military use facility, it has been a problem dealing with NEPA because of the interpretive rules which have come down from the CEQ. These rules require the consideration of what is known as the "no action alternative" as part of any Environmental Impact Statement (EIS). While looking at the no action alternative is very useful for situations involving the development of previously untouched land and resources, the no action alternative is very misleading in the context of redevelopment in situations where, either through natural disaster or other abandonment, a piece of property to be redeveloped is, at the time of the EIS, underused or abandoned. The no action alternative, in these circumstances, places the Federal Government in the position of having, as the base line for determining environmental impacts, an artificially low level of impacts. This can render the redevelopment extremely difficult.

We currently face this situation with respect to the Supplemental EIS that has been ordered for the former base. The no action alternative that exists today is a base that has a very low level of reserve military use along with some ancillary law enforcement uses. This extremely low level of activity is dramatically different from the level of activity that existed at the base prior to Hurricane Andrew. To use the current, artificially low level of activity as the comparative basis for a determination of whether the redevelopment should be allowed, denies logic and harshly impacts South Florida through the possible loss of the valuable resource of the redeveloped use of this base.

This same scenario exists any time a natural disaster, or just programming changes, results in the redevelopment of Federal property after it has become dormant for even a short period of time. This should be corrected.

A possible solution could be to require that the no action alternative be based upon the level of use that the property experienced at its highest level of use in the past. In this way, redevelopment of property that has been dormant or artificially reduced in use for some period of time would be appropriately based upon the level of use that had existed in the past. This way the people will not be denied the appropriate use of properties that have previously been developed while still protecting those natural lands that should continue to be protected. By using the prior level of activity as the basis for future determinations, the prospect of over development and over expansion can still be controlled.

---

STATEMENT OF THE AMERICAN PETROLEUM INSTITUTE, THE NATURAL GAS SUPPLY ASSOCIATION, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, THE MID-CONTINENT OIL AND GAS ASSOCIATION, THE WESTERN STATES PETROLEUM ASSOCIATION, AND THE NATIONAL OCEAN INDUSTRIES ASSOCIATION

The nation's leading petroleum industry associations appreciate the opportunity to present their views on NEPA process and how it affects our companies' applications to explore for and produce hydrocarbons on Federal lands. This statement is presented on behalf of the American Petroleum Institute (API), the Natural Gas Supply Association (NGSA), the Independent Petroleum Association of America (IPAA), the Mid Continent Oil and Gas Association (MCOGA), the Western States Petroleum Association (WSPA) and the National Ocean Industries Association (NOIA).

API represents more than 400 companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining and marketing. NGSA represents integrated and independent companies that produce and market natural gas. IPAA represents explorers and producers that drill some 85 percent of the nation's oil and gas wells. MCOGA represents petroleum companies in Alabama, Louisiana, Mississippi, Oklahoma and Texas. WSPA promotes policies that will help meet energy needs of the West and the nation. NOIA represents more than 280 companies and many individuals involved in exploration for and development of domestic offshore oil and natural gas resources.

In section 102 of the National Environmental Policy Act (NEPA), the Congress directed all Federal agencies "to use a systematic, interdisciplinary approach ... in planning and decision-making which may have an impact on man's environment ... which will ensure that presently unquantified environmental amenities may be



given appropriate consideration in decision-making along with economic and technical considerations.”

Although NEPA contained few mechanisms to achieve its goals, it has had tremendous impact on public land management decisions as a result of the procedural mandate from Congress, which directs all Federal agencies to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affective quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” The Council on Environmental Quality (CEQ), created by Title II of NEPA, promulgated regulations implementing these action-forcing procedures of NEPA that are binding on all Federal agency decisions.

The requirement that Federal agencies prepare an environmental impact statement (EIS) prior to major agency actions significantly affecting the environment has spawned a body of law that now governs a variety of predominantly private activities involving any degree of Federal oversight, funding or approval. The lead agencies preparing EISs for oil and gas activities on Federal onshore lands are the Bureau of Land Management (BLM) and the U.S Forest Service of the Department of Agriculture. For activities on Federal offshore lands, the lead agency is the Minerals Management Service (MMS) of the Department of the Interior. In both offshore and onshore projects, other agencies, such as the Environmental Protection Agency and the Army Corps of Engineers, are typically involved in consulting roles, sometimes recommending requirements or stipulations for the lead agency to impose as a condition for granting a permit. Although the EIS process has helped achieve many of NEPA’s goals, it has at times and in different places imposed unnecessary delays and costs on petroleum company operations without significant environmental benefits.

Although statutory change is probably unnecessary and existing regulations are adequate, considerable change in the way the process is administered would be beneficial to Federal agencies, project applicants and American taxpayers. The only groups that would oppose change would be those which use the NEPA process to inflict costly and protracted delays in Federal decision-making, so as to sink projects through procedural maneuvering when opposition on the merits is groundless. Among the problems that need to be addressed are the following:

- Fear of litigation has forced Federal agencies to seek “litigation proof” reviews, which leads to unnecessary analysis, cost and delay. A lower confidence level should be satisfactory.
- Too often the Environmental Protection Agency (EPA) only provides comments on draft EISs, frequently at the end of the comment deadline. EPA should identify its concerns early in the NEPA process, as contemplated in NEPA and the CEQ regulations. Extraneous analysis could be eliminated if salient issues were identified earlier and analysis were kept focused on important issues.
- At times lead agencies have difficulty getting other agencies with jurisdiction or relevant expertise to become “cooling agencies.” If a request to a sister agency is denied, lead agencies are often unwilling to enforce CEQ regulations that require all agencies with jurisdiction to participate in the process.

With regard to onshore projects in particular, we would note the following difficulties:

- There is a tendency in the BLM and Forest Service to slow down the process simply because a project may be controversial, rather than moving forward with an efficient “issue management” approach.
- Cooperating agencies do not always reflect an adequate understanding of the multiple-use mission of the BLM and Forest Service. Hence, they often try to force projects to comport with their own narrower agendas.
- Agencies have demonstrated a lack of understanding of CEQ regulations implementing NEPA and/or a lack of commitment to following CEQ guidelines.
- NEPA team leaders often have little or no experience or training in managing the NEPA process or dealing with the type of project under consideration. There is a lack of support and oversight on NEPA projects by agency managers and NEPA specialists.
- There is no agency accountability for the NEPA process.
- Often there is poor communication between the project proponent, the lead NEPA agency and any third-party contractor retained to conduct the analysis.

- When project proponents are paying third-party contractors for EIS work, there is no obligation or incentive on the agency's part to streamline the work, improve efficiency or otherwise reduce cost.
- Agencies often fail to explore preferred mitigation efforts early in the process with other appropriate agencies and stakeholders. Agencies are often unwilling to dismiss frivolous public commentary and to separate ideological commentary from that focused on project-specific environmental impacts.
- The NEPA process sometimes creates timing difficulties when understaffed agencies are asked to meet tight comment periods and time lines. Cooperative planning memorandums of understanding between lead agencies and state and local regulatory authorities could minimize difficulties and duplicative efforts while still allowing for meaningful input from all parties.

Offshore projects encountered their own unique problems over the years. However, the MMS, in working with industry public commenters, has been able to significantly streamline the offshore NEPA process in the traditional offshore areas. In the past, after a preliminary environmental assessment (EA) of proposed agency actions, the MMS routinely prepared full-blown EISs prior to offshore lease sales, and prior to implementation of each 5-year Outer Continental Shelf (OCS) Leasing Program. Numerous full-blown EISs were prepared over the years for lease sales in the central and western Gulf of Mexico. It is our understanding that, on average, it took MMS approximately 2 years to identify, design, conduct, evaluate, draft, respond to comments, and publish full-blown EISs. In these traditional areas, the final EISs contained similar information. Since CEQ's implementing regulations provide for the agencies to develop "categorical exclusions" to avoid duplicative EIS requirements, MMS has moved significantly to streamline the process in the traditional offshore areas.

Oil companies must seek numerous Federal, state and local approvals for offshore activities, such as Exploration, Development Operation Coordination Documents, Plans of Development, and right-of-way applications. As part of MMS's former review and approval process of each application, it had to make redundant internal environmental assessments for each step, adding unnecessary time and costs to the approval process. As a result of MMS's evaluation of these past delays and redundant compilations of information, MMS has become one of the most responsive and cooperative of Federal agencies involved in the NEPA process. Current MMS NEPA requirements, as applied to the Gulf of Mexico OCS, include preparing one EIS for multiple sales. In the central Gulf of Mexico, MMS prepared a single EIS covering the next five proposed OCS lease sales.

With thousands of operations conducted annually on the OCS, and with strict liability regulations in place to assure that those operations are performed prudently, using the highest environmental mitigation technologies, MMS has concluded that additional full-blown NEPA reviews in traditional areas such as the central and western Gulf of Mexico are unnecessary.

The full-blown EIS process in frontier areas—for example, in ultra deep waters and the Eastern Planning Area in the Gulf of Mexico—is important to provide MMS as the lead agency with new environmental information. These studies should be expedited so that MMS will have the body of data necessary to decide if categorical inclusions for these areas are warranted.

---

#### STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation (AFBF) is the nation's largest general farm organization. AFBF has affiliated state Farm Bureau organizations in all 50 states and Puerto Rico, representing the interests of more than 4.8 million member families. We appreciate the opportunity to submit this statement for the hearing record, and to bring to the Committee some of the problems and concerns that we have encountered with the application of the National Environmental Policy Act (NEPA).

One of the primary stated goals of NEPA is to "encourage productive and enjoyable harmony between man and his environment." The statute provides a mechanism whereby the environmental impacts of Federal agency action can be assessed, taking into consideration the social and economic implications for such actions. NEPA is not designed to create any new substantive rights.

There are three main issues that we want to bring to the attention of this Committee with regard to NEPA.

*1. Farmers, Ranchers and Other Economic Interests Are Being Denied Judicial Standing To Challenge the Agencies' Compliance With NEPA.*

Despite the fact that NEPA is ostensibly just a procedural statute, it has been the subject of extensive litigation. Most of the litigation has centered on the adequacy of a Federal agency's compliance with the provisions of NEPA. Challenges take the form of suits claiming that more extensive documentation should have been prepared in particular cases, or that the prepared documentation was inadequate.

Unfortunately, recent court decisions addressing the scope or adequacy of NEPA documentation have not included any cases brought by farmers, ranchers or other landowners. That is because a number of Federal courts have held that farmers, ranchers and other landowners have no judicial standing under NEPA to challenge the adequacy or sufficiency of NEPA documents. Such courts have held that social and economic interests are not within the "zone of interests" contemplated by NEPA, and they conclude that there is no basis to bring suit to challenge decisions made under the law.<sup>1</sup>

The courts that have denied standing to economic and social interests to challenge NEPA documentation have failed to consider the balancing between man and the environment required by NEPA and that was one of the primary purposes of NEPA as set forth above. NEPA requires agencies to consider the social and economic impacts of agency action in evaluating alternatives, but courts do not give those interests any recourse when impacts are ignored or not adequately described.

Nevertheless, these decisions are on the books. Farmers, ranchers and other landowners have no way to challenge the adequacy of NEPA compliance in those jurisdictions where these cases exist. Even though NEPA only creates a process that agencies must follow, the information that is produced as part of that process plays a big part in the decision that is ultimately reached. Agencies rely on the information that is developed in reaching a decision. Thus, if any aspect of the information required to be developed is inadequate or is inaccurate, that deficiency skews the entire decision-making process.

The denial of standing for farmers and ranchers to challenge the NEPA process is detrimental for a number of reasons. By denying them the opportunity to protect their interests, it effectively denies them any meaningful participation in the NEPA process. An agency that has no accountability for the accuracy or completeness of its social and economic analysis will likely pay less attention to that part than to other aspects of the analysis.

Denial of standing also creates the inequitable result that only conservation interests can challenge decisions adverse to them, while commodity interests cannot challenge decisions adverse to them. Agencies only have to pay attention to one side of the issue, because that is all they can be held accountable for. The "balance" that NEPA called for between man and his environment has thus been destroyed. Instead of promoting that balance as NEPA was intended to, the manner in which NEPA is being interpreted is making consideration of man with his environment even more out of balance.

This problem has adverse impacts on decision-making as well. Agencies considering only one side of an issue necessarily suffer because they do not consider the other. Effective decisionmaking best occurs when all sides of an issue are considered.

This problem could be solved through legislation, with an express provision defining standing under the Act. Until this situation is resolved, the intent of NEPA will be thwarted, and the quality of decision-making thereunder will suffer.

## 2. *Resource Planning and Implementation Activities Are Too Often Subject to Duplicative NEPA Compliance.*

Another major problem hamstringing land management agencies is the duplicative NEPA compliance that is required for both planning activities and for implementation of those planning decisions.

The National Forest Management Act (NFMA) requires the Forest Service to develop forest plans for each element of the National Forest system. Similarly, the Bureau of Land Management is required to develop land management plans for each unit of its system. Typically, these plans encompass the entire unit, and are broad based documents that encompass all or almost all resource uses within the unit.

The management plan is implemented within each unit through individual site-specific management actions. If, for example, a forest plan calls for 30,000 animal

<sup>1</sup>Examples of such decisions include *Nevada Land Action Association v. U.S. Forest Service*, 8 F.3d 713 (9th Cir. 1993); *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993). This exclusion was also used to deny Farm Bureau standing to challenge the adequacy of the Environmental Impact Statement for the Reintroduction of the Gray Wolf Into Yellowstone and Central Idaho, *Wyoming Farm Bureau Federation, et al v. Babbitt, et al.* No 94-CV286-D, District of Wyoming (1997)

unit months of grazing per year in the forest, that broad statement is implemented through the implementation of individual grazing permits that total 30,000 animal unit months per year. The plan paints the broad picture—individual implementing actions fill it in.

Forest and resource plans are subject to the provisions of NEPA. All plans were preceded by an Environmental Impact Statement (EIS) prepared in accordance with NEPA. The EIS for each plan was used to determine use allocations and locations within the forest. The goals, objectives and broad design for each resource unit are determined through the public participatory processes spelled out in NEPA.

Once these goals have been determined, however, the actions that implement these plans should not also have to go through the same process. The extensive analysis undertaken for each forest plan or resource plan pursuant to the National Environmental Policy Act is undermined by going through the same process for each project level activity (such as grazing permit renewals), notwithstanding the fact that such activities are in compliance with the forest plan. If adequate NEPA has been done in the development of the management plan, the same process ought not have to be repeated for individual projects that implement the plan. This results in a waste of money, manpower and time.

These duplicative actions also hamstringing the ability of a land management agency to accomplish its mission. Instead of on-the-ground work, agency personnel are tied up doing NEPA work onsite-specific projects that should not have that level of analysis in the first place.

An example of this situation occurred in 1995, with the renewal of Forest Service livestock grazing permits coming due. More than half of the over 9,000 permits were up for renewal by the end of that year, and the Chief of the Forest Service had determined that NEPA must be complied with before permits could be re-issued. Livestock grazing allocations had been determined in forest plans after having gone through the NEPA process. This situation threatened to tie up Forest Service personnel for a long period of time doing nothing but NEPA compliance for grazing permit renewals. Fortunately, this situation was resolved before the entire Forest Service became nothing more than a NEPA compliance factory. But it took a legislative solution to accommodate all interests.

That is not to say that NO analysis is necessary at the implementation phase. But it certainly should not have to be an EIS. As long as the implementing action is consistent with and in accordance with forest or resource allocations, a much lesser level of analysis should be sufficient. Perhaps all that is needed is an analysis to determine that conditions are the same or similar to when the management plan was developed. In any event, there needs to be some accommodation so that the same costly and time consuming work that is being conducted at planning levels is not being needlessly duplicated at the implementation stage.

### *3. Little or NO NEPA Work is Done on Many Things that Affect Federal Resource Units.*

We have described above situations where compliance with NEPA results in the same NEPA activities being required to implement specific measures that have already undergone NEPA analysis.

Ironically, little or no NEPA work is usually done for actions that actually represent changes in direction of the land management plan. For example, the Forest Service has adopted multi-forest or regional guidelines, or developed watershed plans or ecosystem management plans, that may affect a number of forest plans. Within the framework of NFMA, these changes would be viewed as plan amendments, yet very rarely is NEPA ever performed or forest plans even formally amended to incorporate these additional plans. Instead these additional processes are overlain on the forest plan and not made a part of it. The use of these devices serves to circumvent the requirements of NEPA altogether.

These are but a few of the general issues affecting the way NEPA works. In some cases it causes duplication, while in other cases it allows complete circumvention of its requirements.

All three of the issues that we have identified here are important, and they subvert the purposes for which NEPA was enacted. All three can be solved by some legislative direction or clarification. If anything is to come out of this hearing, we hope that it can be a way to resolve these issues. The American Farm Bureau Federation offers its assistance to satisfactorily resolve these situations.

**Testimony of Wyoming Governor Jim Geringer  
Delivered to the U. S. House of Representatives  
Committee on Resources Oversight Hearing  
The Honorable Don Young, Chairman  
March 18, 1998**

**The National Environmental Policy Act: Opportunity disguised as Problems**

Chairman Young, members of the Committee on Resources Oversight, thank you for inviting me to testify on the National Environmental Policy Act (NEPA). I commend you for your efforts to work with our states, associations and individuals to step out and create new opportunities out of old problems associated with the implementation of NEPA.

I am here as the Governor of Wyoming, to represent the people of Wyoming, the people whom Congresswoman Cubin was elected to serve. I also speak to you as the Vice-Chairman of the Western Governors' Association, as Chairman of the Interstate Oil and Gas Compact Commission and for the Great Plains Partnership which I co-chair along with John Sawhill of the Nature Conservancy. I cite these organizations and their interest since all of them are working to improve the process of involving people, our lands, our livelihoods and our future in resource management. I'm here to represent the people, Mr. Chairman.

The Western Governors in particular, have worked hard to increase the level of cooperation between and among federal and state managers. Central to our focus has been NEPA and the efforts by the Council on Environmental Quality (CEQ) to streamline the implementation of NEPA.

The National Environmental Policy Act was enacted in 1969 with the stated purpose of "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment." Further on in the Purpose Clause, the act declares that "it is the policy of the Federal Government, in cooperation with *State and local governments* and other concerned public and private organizations... to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations."

I call your attention to those words, Mr. Chairman, as the impact and intent have been diminished considerably over the years since they were enacted. I affirm the clear statements of the Chair of the Council on Environmental Quality, Kathleen McGinty, seated with me here today, that we have much to be gained in finding common ground to conserve resources for future generations at the same time we provide for a stable economic future for our people.

Quoting from Ms. McGinty's Statement from the Chair in the CEQ 25<sup>th</sup> Anniversary

Report, "...our common ground - the environment - has become a battleground. Somehow, nearly half of the Environmental Protection Agency's work is not the product of our collective will on the environment, but rather the product of judicial decree. Somehow, we have become a country in receivership, with the courts managing our forests, our rivers and our rangelands."

In fact, Mr. Chairman, it's not just that the courts are directly managing many of our resources, they are indirectly managing nearly all the resources in our states because of the *fear* of litigation, not just because of actual litigation. Mr. Chairman, the act called NEPA is not the problem so much as the implementation of the act. It takes too long, costs too much, spawns unending litigation and is so inconsistently implemented that each agency requires custom tailoring of its approach. You likely would not have to amend NEPA at all, Mr. Chairman, if you would simply require the federal government to be consistent and speak with one voice. We must change the confusing and contradictory regulations used by federal agencies to implement NEPA. Related federal laws such as the National Forest Management Act, the Federal Land Policy and Management Act, and the Federal Advisory Committee Act also should be reviewed to clarify their impact on NEPA implementation and to identify inconsistencies or conflicts that need to be addressed.

The Act is intended to require a comprehensive view of federal, state and private actions that are comprehensive, elicit better planning, are inter-generational in their beneficial effect, and strike a wholesome balance between the environment and the economy.

The CEQ's Twenty-Five Year Effectiveness Study of NEPA articulates the Act's strength as a tool for better decisions, and the Act's foresight in anticipating today's need for enhanced local involvement and responsibility in environmental decision making. The Study also recognizes several areas where NEPA implementation needs improvement, areas that CEQ is using to point the way for its NEPA reinvention effort. As part of this effort, Ms. McGinty has advocated a stronger role for state and local governments, an advocacy I strongly support.

I have several suggestions for improving NEPA but the importance of a stronger role for state and local governments is what I emphasize most today. Recently, the state of Wyoming was granted cooperating agency status for the preparation of the Yellowstone National Park Winter Use Environmental Impact Statement, along with the States of Idaho and Montana. We had to work very hard to overcome the resistance of federal officials to achieve cooperating agency status. We should routinely expect to be designated as Joint Lead or Cooperating Agency on major projects that need either an Environmental Assessment or an Environmental Impact Statement.

That approach is certainly supported at the highest levels of the current administration, even though the actions haven't trickled down to the agencies yet. In a letter to me dated August 11, 1997, CEQ Chair McGinty wrote "Regulations implementing the Act at CFR 1508.5 are clear that a state or local government may, by agreement with the lead agency, become a cooperating agency. Frankly, considering NEPA's mandate and authority granted in federal regulation to allow state and local cooperation through agreement, cooperator status for state and local governments should occur routinely." I commend the willingness of Ms. McGinty to work with the states as

we develop a more collaborative process that would streamline the application of NEPA.

Clearly, the shortcomings in the NEPA process are in application, not purpose. Unfortunately, the clear objectives of NEPA and the CEQ are not reflected in federal agency regulations or in practice. Agencies have too much focus on producing litigation-proof documents and too little concern with involving people in the process. To streamline the NEPA process, improvement is needed in five key areas.

First, involve the right people, including local and state governments, from the beginning. NEPA is supposed to be a tool for better decisions, yet agencies typically engage in consultation only after a decision has already been made. I routinely receive federal agency officials in my Wyoming office who come by to "update" me on actions they have already taken or will take. I am weary of being "updated." The States are partners in natural resource management. Rather than being "updated," we should be included in the planning and evaluation process to insure that our people are represented in the spirit in which NEPA was enacted.

I remind those here today that the states were not created by the federal government. Rather, the federal government was created by the states. We the states are not employees of the federal government. We have governing responsibilities under law that can not and should not be set aside. You could make one change in the law, Mr. Chairman that would warm the hearts of all the governors and certainly the people. When federal agencies write the regulations to implement a law, they have the power to set aside any state law that conflicts with federal regulation. If state law is to be set aside, do it only through specific federal law that cites individual needs. But please don't continue the practice of allowing any federal regulation to cavalierly set aside the peoples will in the states.

The states have mandates of their own under law. Clearly, we have shared and concurrent jurisdiction with the federal agency managers. For instance, while the U. S. Forest Service and the Bureau of Land Management oversee much of the land management issues in the West, the states have primacy over wildlife management, air quality, water quality, solid waste disposal and water rights management on those very same lands. Our joint, or shared responsibilities require a full partnership, not just a close relationship. I repeat - we want a full partnership, not just a close relationship. A police officer with a prisoner in handcuffs has a close relationship with the prisoner, but I would hardly call it a partnership. Mutual respect and benefit characterize a partnership. Take the handcuffs off, Mr. Chairman.

We are encouraging collaboration of groups working on natural resource management issues in each of our associations. The Interstate Oil and Gas Compact Commission membership includes 36 states and four international affiliates. We are actively involved in conservation of oil and gas resources for the current and future generations. In a similar fashion, the Great Plains partnership includes 14 Great Plains states and three provinces from Canada. Where the Rocky Mountain States are dominated by federal land ownership, the Plains states are dominated by private land ownership. Yet our concerns over NEPA are the same.

The Mission of the Great Plains Partnership is "to catalyze and empower the people of the

Great Plains to define and create their own generationally sustainable future." What does that mean in simple English? My version goes something like this. Help people on the land feel good about stewardship, in control of their choices, so that they can pass something along to their children that's better than they received. We have to show in plain and simple actions that the environment, the economy and the community are compatible.

That means that we have to appreciate the resource while we respect the people, and leave them secure in the belief that they can take control of their destiny to assure the destiny of their children. Our citizens are tired of gridlock and feeling left out of the process. They are willing and able to participate. Local involvement, especially early in the process, can greatly reduce conflicts. I strongly support changes to federal agency regulations to allow early involvement of all parties in the NEPA process. Oregon Governor John Kitzhaber and I are the co-chairs of the WGA committees that promote collaboration and cooperation on resource issues to enhance the balance between economic and environmental issues. Oregon as an example, developed a forest management plan with the state as lead agency and with great participation by the public.

My second recommendation is that coordination among and within agencies must be improved. Too often, NEPA's requirements have resulted in the duplication of environmental analyses of projects by multiple federal agencies. Agency accountability for the NEPA process is minimal or nonexistent. There is often poor coordination among the project proponent, lead agency, and third party contractors hired to conduct the analysis. When project proponents are paying the contractors, there is no obligation or incentive for the agency to streamline, improve efficiency or reduce cost.

Third, inconsistencies among and within agencies must be reduced. Federal agencies operate under different mandates and laws and each agency has developed its own unique set of NEPA regulations which adds to the confusion and complexity of the NEPA process. NEPA implementation can even vary within agencies. For example, in their NEPA documents for grazing allotments, one National Forest in Wyoming requires permittees to monitor grazing impacts on all rangelands in that forest. Another forest allows only Forest Service officials to do the monitoring, and yet a third forest allows the policy to change from district to district. The NEPA debacle grows far worse for ranchers who graze livestock on both Forest Service and BLM lands. Then they have to understand and comply with strikingly different rules and rule interpretations though the environment on the adjoining lands is remarkably similar. We have one federal government. Federal agencies should speak and act with one voice.

Initiating a NEPA process is also a matter of preference, not law. For example, the U.S. Fish and Wildlife Service maintains that a NEPA document is required for the proposed vaccination of elk against brucellosis on the National Elk Refuge near Jackson, Wyoming. Meanwhile, other federal entities, including the Fish and Wildlife Service, have vaccinated wildlife without NEPA, on the National Bison Range, Wichita Mountain National Wildlife Refuge and Wind Cave National Park without NEPA assessment. The Wyoming Game and Fish Department, at the request of the Fish and Wildlife Service, conducted an elk vaccination program on the refuge from 1989-1991, and Wyoming vaccinates wildlife on Forest Service lands, all without a



NEPA requirement. Thus the decision to now require a NEPA process for elk vaccination appears to be completely arbitrary.

Fourth, training of federal agency personnel needs to be improved and increased. In particular, training should focus on:

- recognizing the legitimate role for state and local governments early in the process
- understanding the difference between EA's and EIS's
- developing consistency in defining and identifying reasonable alternatives
- writing concise, clear documents in plain language with EA's no more than 15 pages and EIS's no more than 150 pages in accordance with existing regulations
- setting boundaries during scoping to focus discussions and reduce misuse of the process
- limiting the time to accomplish the EA and EIS documents.

Also, federal officials should be able to explain policies and process to state and local officials, as well as to the public.

NEPA must involve the public in decision making. When NEPA documents are extremely technical and long, the chance of involving the public and not surrogates for the public (public interest lawyers), is decreased. New technology can aid in involving the public. These technologies could include geographic information systems and common data baselines so that information and presentation would not have to be reinvented with each successive action. Because of the power inherent in visual images, a major role for determining that the images themselves are unbiased is important.

Fifth and, finally, a scientific, substantive basis for asking "what if" needs to be established, to reduce endless inquiries and unnecessary data collection. In some cases, NEPA has been misused to force lengthy delays after many months have been spent studying, analyzing, planning and developing projects. Agencies are just plain unwilling to dismiss frivolous public comments and to separate ideological commentary from that focused on project specific environmental impacts. Boundaries should be set during scoping to focus discussions and reduce misuse of the process. We should insist on the use of "adaptive management." The National Academy of Sciences states that "...in adaptive management, management and research are combined so that the projects are specifically designed to reveal causal relationships between interventions and outcomes, that is, to maximize learning." In adaptive management, you make decisions earlier, check the outcomes regularly, and adapt if the premise was not exactly as

expected. When agencies work to eliminate every possible contingency, or "what if..." they are unmercifully slow in reaching conclusions.

NEPA requires that the best *available* information be used in the analysis. Instead, agencies often view NEPA as an opportunity to collect any type of data, without regard for whether the data are necessary for the proposed project. There is a need to establish more uniform data adequacy standards for EIS's.

Regulation should be built upon adaptive management and trust. Make a decision, based upon the best information at that time. Don't try to cover every possible contingency. You can

always ask one more question that starts off with "What if..." Make the decision. Get under way. Monitor the performance. If there is impact, adapt to correct the problems. Use accurate science and modern technology. And train people to be objective.

#### **Steps Underway**

We are encouraged by and support steps already underway to address many of the NEPA implementation issues outlined above. In Wyoming, we have drafted a memorandum of understanding (MOU) among county commissioners, the state, conservation districts, the Forest Service and BLM to improve communication, cooperation and efficiency in resource management. The MOU is intended to serve as a model framework for developing local, site-specific agreements among affected government entities. Also, my office, the Office of Federal Land Policy, and the CEQ are collaborating with the University of Wyoming's Institute for Environment and Natural Resources in conducting pilot projects and workshops to help integrate NEPA and collaborative decision making efforts throughout the West.

Let me repeat the phrase I quoted earlier from Kathleen McGinty's letter to me: "...cooperator status for state and local governments should occur routinely." The thought is worth repeating since it is central to our concerns about NEPA, and not all federal managers embrace the notion of cooperation.

The culture and history of the Rocky Mountains reflects a strong spirit of independence and innovation. Imbedded in the success of our past lies a deep seated respect for each other and the spirit of cooperation. In the West, cooperation isn't just a matter of neighborliness, it can often mean survival. Supporting each other. Respecting the resource. Conserving for the next generation. Preventing the irreversible deterioration that comes from lack of stewardship. It is in this spirit that I have presented my comments today, with the goal of improving the implementation of NEPA.

Thank you, Mr. Chairman. I would be pleased to answer questions.

Western Governors' Association  
Resolution 96 - 005

June 24, 1996  
Omaha, Nebraska

SPONSOR: Governor Geringer  
SUBJECT: Implementation of the National Environmental Policy Act

**A. BACKGROUND**

1. The National Environmental Policy Act (NEPA) as originally passed in 1969, is our national charter for protection of the environment. The Act and subsequent regulations establish policy, set goals, and provide the means for carrying out the policy. By requiring that environmental information be available, the Act has been an important mechanism for opening up governmental decision making to consider state, local, tribal and public input on the environmental impacts of human activities. However, this requirement has been clarified and limited by regulation which states: "Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." (NEPA, 40 CFR Parts 1500-1508, 1500.1 (b))
2. Concerns have been raised about the operation of NEPA and how it can be more effectively implemented. Too often, NEPA's requirements have resulted in duplicative environmental analyses of projects by multiple federal agencies. In addition, each federal agency has developed its own set of NEPA regulations and processes which further adds confusion and complexity. In some cases, NEPA also has been misused by forcing lengthy delays -- especially at the "eleventh hour" -- after many hours have been spent studying, analyzing, planning and developing projects.
3. The Western Governors' Association has noted from a variety of sources, including the recently completed 'delphi' concerning management of the nation's public lands, that broad-based concerns are being expressed by a wide variety of stakeholders concerning the implementation of NEPA by the federal agencies. Suggestions for improving the NEPA process have focused on:
  - shortening the decision-making timeframe
  - reducing duplication of efforts by multiple agencies
  - making the Act more workable and efficient
  - providing for greater consistency among agencies
  - improving public input process
  - reducing the overall volume of paperwork
  - simplifying the process to reflect experience since 1969.
  - improve procedures for coordinating NEPA review with similar state processes

**B. GOVERNORS' POLICY STATEMENT**

1. The Governors believe that the broad goals and objectives of the National Environmental Policy Act are important and have improved the overall quality of decisions by federal agencies. The Act's intended purposes - to provide meaningful public input, analyze the environmental impact of actions, and provide for appropriate review of decisions - are all important and should be continued in the future. Administrative improvements in the NEPA process should focus on:
  - Improving the sharing among agencies of high quality model NEPA documents,
  - Improvements to the early public input process - scoping, public disclosure, etc.
  - Better utilization of collaborative learning and shared understanding
  - Improving training for agency personnel in NEPA implementation
  - Broader utilization of 'plain english' throughout the process - more user friendly,
  - Expanding the use of 'technical reports' to supplement environmental assessment issues and reduce the need to complete EIS's, and
  - Seeking approval of EA/EIS's at lower administrative levels in the agencies.
  - Identifying through public input and scientific data the most efficient and consistent level and scope of analysis.
2. Training of agency personnel and the public (where appropriate) has often been lacking or insufficient. The Governors support and encourage federal agencies to provide timely and appropriate NEPA training for their employees, state and local officials and the public.

**C. GOVERNORS' MANAGEMENT DIRECTIVE**

1. The Western Governors' Association shall form task teams to develop more specific recommendations for legislative and administrative change.
2. This resolution shall be transmitted to the President of the United States, the Administrator of the U.S. Environmental Protection Agency, the Council on Environmental Quality, the Secretaries of Interior and Agriculture, the Senate Energy & Natural Resources Committee, Senate Environment and Public Works Committee, and the House Resources Committee.

**TESTIMONY OF KATHLEEN A. McGINTY  
CHAIR, COUNCIL ON ENVIRONMENTAL QUALITY  
EXECUTIVE OFFICE OF THE PRESIDENT  
BEFORE THE HOUSE RESOURCES COMMITTEE**

**MARCH 18, 1998**

Mr. Chairman, Members of the House Resources Committee:

I am pleased to have the opportunity to appear before the Committee to discuss the National Environmental Policy Act (NEPA). As you know, Congress passed the National Environmental Policy Act in 1969 and President Nixon signed it into law on January 1, 1970. This landmark statute became, and today remains, the foundation of our nation's environmental policy making. NEPA's passage marked an environmental awakening in America. To understand what inspired Congress to enact this far-reaching statute, it is helpful to recall the eloquent words of Senator Henry Jackson, one of its principal authors. "What is involved here," he said, "is a congressional declaration that we do not intend, as a government or a people, to initiate actions which endanger the continued existence or health of mankind: that we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth."

Congress did not simply issue a declaration, however. The framers of this statute understood that true environmental protection could be achieved only by incorporating this goal into the very fabric of federal decision making, and by integrating it as well with our social and economic aspirations. Indeed, in the words of the statute itself, federal agencies are to conduct their programs in a way "calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."

In pursuit of this overarching goal, the statute set forth four principles that represent the pillars of NEPA. The first, as I have already noted, is the integration of environmental, economic and social objectives -- the explicit recognition that they are not contradictory or competing, but rather inextricably linked. The second is sound decision making based on thorough, objective analysis of all relevant data. The third is effective coordination of all federal players in the development and execution of environmental policy. And the fourth is the democratization of decision making -- giving citizens and communities a direct voice in decisions affecting their environment and their well-being.

To advance these principles in the day-to-day workings of our government, NEPA established three primary mechanisms. The first is the agency that I chair, the Council on

Environmental Quality (CEQ). Congress recognized the need for a permanent environmental body within the Executive Office of the President to advise the President on the development of environmental policy. CEQ's functions include monitoring environmental trends, assessing the success of existing policies, overseeing and coordinating policy development, advising federal agencies on their responsibilities under NEPA and, when necessary, mediating conflicts among the agencies. The second mechanism is the requirement that agencies fully integrate NEPA's goals and policies into both their planning and their day-to-day activities. The third is the environmental review process, which was intended to do something other than generate dry, lengthy documents called environmental impact statements. Rather, the objective is to ensure rational, informed decision making. Later in this testimony, I will describe in some detail our efforts to reinvent this process to better serve the public and the environment.

I believe strongly in the mission declared for us by Congress nearly 30 years ago, and in my tenure as chair of CEQ, I have strived to fulfill it in a way that both honors the intent of NEPA's framers and meets new types of environmental challenges. Now, as citizens and government leaders recognize the need for "sustainable development," NEPA's directive to harmonize economic, social and environmental concerns was prescient, indeed. This Administration is absolutely committed to the principle that a healthy environment and a strong economy go hand in hand -- that environmental protection need not burden business or taxpayers but, to the contrary, can open new economic opportunity and ensure thriving communities for all Americans. In that spirit, CEQ has worked to bring the variety of voices to the table in every major issue and to innovate and bring common-sense reforms to environmental policy making overall. I would like now to review some of our major successes in advancing the fundamental principles of NEPA, and our efforts to reinvent the environmental review process.

#### NEPA SUCCESSES

Through NEPA, CEQ has strived to promote sound decision making, integrate environmental, economic and social considerations, coordinate the actions of federal agencies, and allow local government and the public a stronger voice in federal decision making. Through a series of concrete examples, I would like to illustrate how NEPA works not only to protect the environment, but also to bring economic and social issues into environmental policy making, give citizens a seat at the table, and save scarce federal resources.

*Saving Money and Wetlands in Myrtle Beach, South Carolina* - Often, NEPA represents the best, if not only, opportunity for citizens directly to participate in federal decision making and direct an agency's attention to community concerns. One such example is the Conway Bypass project in Myrtle Beach, South Carolina. In response to community concerns, the Federal Highway Administration (FHWA) created a wetland mitigation bank through innovative use of the NEPA mitigation process and, working with the South Carolina Department of Transportation, was able to preserve one of the East Coast's most significant ecological reserves. It is worth noting a second result -- a \$53 million savings in bridge costs. Additional savings are anticipated from

the planned future use of the Sandy Island Mitigation site in the Carolina Bays Parkway Project and the Mark Clark Expressway project. This success was also made possible by the coordination, encouraged by NEPA, of several agencies including FHWA, the Army Corps of Engineers (COE), the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) and numerous state agencies.

*Defining a New Mission for DOE* - Many agencies have learned NEPA's value as a planning tool to help define their activities and mission. The Department of Energy (DOE), for instance, has made extensive and effective use of programmatic and site-wide NEPA reviews in determining how best to transform its nuclear weapons complex to appropriate post-Cold War functions and fulfill its environmental cleanup obligations. As Secretary of Energy, Admiral James Watkins initiated a reinvigorated NEPA process at DOE and said it was key to the decision to defer selection of a costly tritium production technology. "Thank God for NEPA," Admiral Watkins told the House Armed Services Committee in 1992, "because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country."

*Customs Service Facilities on the Rio Grande* - When the U.S. Customs Service proposed a major expansion of a border station to provide import lot and docking facilities on the Rio Grande near the Juarez/Lincoln International Bridge between the U.S. and Mexico, the General Services Administration (GSA) undertook planning for the project and began preparation of an EIS examining six different ways to build the facilities. GSA also examined a "no action" alternative, as required by CEQ regulations. The projected costs for building the facilities ranged from \$27 million to \$54 million. However, time and motion studies conducted for EIS purposes showed that backups at the existing facility resulted from too few inspectors rather than too few docks. Computer modeling for the EIS indicated that with new facilities already planned or under construction in the vicinity, there would be no need for the facility until at least sometime after 2020. As a result, the "no action" alternative was selected and the money projected for use on the project was saved.

*Highway Projects in the Atlanta Metropolitan Region* - CEQ recently mediated a dispute between EPA, the U.S. Department of Transportation (DOT), and the Georgia Department of Transportation that concerned five highway projects in the Atlanta area. Vital highway improvements were threatened with delay -- or prohibition -- as EPA rightly objected that the region was not making sufficient progress in improving air quality. With CEQ's mediation, an agreement was reached to approve unconditionally three projects while giving limited and conditional approval to the two remaining projects. Also, as a result of these negotiations, the Georgia Department of Transportation agreed to develop a transportation plan within 18 months that will demonstrate exactly how federal air quality standards will be achieved in the Atlanta region.

*New York-New Jersey Harbor Dredging* - CEQ has continued to oversee the Administration effort that resolved the impasse over dredging in the Port of New York and New Jersey. For

years, dredging permits had been struck down or held up by the threat of litigation by groups objecting to offshore disposal. Under a plan developed by CEQ and supported by a broad range of industry, labor, and environmental groups, EPA and the Army Corps revamped the dredging permit process so that more dredging was authorized in one year than had been authorized in the preceding three years combined. EPA closed the controversial Mud Dump Site off of New Jersey's coast, while establishing a remediation site that will result in remediation of toxic hot spots and beneficial use of clean dredged material from the harbor. CEQ continues to oversee progress in the Port, as well as to work with other ports and concerned Members of Congress on infrastructure needs, permitting issues, and dredge material disposal.

*Agreement on California's Bay-Delta* - CEQ continues to play a central role in a state-federal partnership seeking a lasting solution to long-standing water conflicts in California. The historic Bay-Delta Accord, reached in December 1994 and renewed three years later, has been instrumental in bringing contentious parties to the table to resolve water allocation issues in the Sacramento-San Joaquin River system in Northern California. It set the stage for the CALFED Bay-Delta program, a cooperative interagency effort involving state and Federal agencies with management and regulatory responsibilities in the Bay-Delta. Bay-Delta stakeholders -- agricultural, industrial and urban water users, and environmental groups -- are involved in problem solving and developing long-term solutions to restore fish and wildlife habitat, to improve flood protection, to provide adequate water supply to all users, and to ensure clean water. The CALFED Bay-Delta Program will work in the coming year to find a "preferred alternative" that meets the program's goals and satisfies stakeholder concerns.

*Resource Conservation and Recovery Act Reform* - CEQ convened a series of discussions among concerned constituencies, representatives of state governments, and a bipartisan Congressional group to develop a consensus on changes to the Resource Conservation and Recovery Act (RCRA) that would reform the regulation of remediation waste. These discussions advanced the President's initiatives for reinventing environmental regulation and complemented work on RCRA reform initiated by Senators Lott and Breaux in the 104th Congress. The General Accounting Office (GAO) participated in the meetings, which in part formed the basis for a later GAO report highlighting the need for targeted RCRA reform. CEQ and EPA are working with Senate offices to develop a consensus bill that is expected to provide the basis for a RCRA reform bill in the second session of the 105th Congress.

*Floodplain Management* - CEQ, in close cooperation with the Office of Management and Budget (OMB), has led an intergovernmental effort to encourage Federal agencies, state and local governments and nongovernmental organizations to afford communities a variety of choices in flood response, including non-structural alternatives as well as traditional structural levee repair. CEQ is working with Federal agencies to implement the policy and program recommendations derived from recent experiences with disastrous flooding in the Midwest, the Northwest, and California. Successful strategies clearly depend on interagency cooperation and incorporation of environmental considerations into response planning in an efficient and effective way. As part of this effort, the intergovernmental committee will host a flood workshop to gather further



expertise in flood management in mid-1998.

#### NEPA REINVENTION

One of the overarching goals of this Administration is to reinvent the federal government to do more with less -- to create a leaner, more flexible government that is a catalyst for new, innovative ideas and gives America's people the tools they need to make the most of their lives.

At CEQ, we have applied this philosophy by working to reinvent NEPA. We recognize that despite its many successes, NEPA, like any statute, is not always implemented as effectively as it might be. We are committed to reinventing NEPA to reduce unnecessary delays, save taxpayer money and promote sensible, cost-effective reform of environmental decision making. We do this every day in our routine oversight activities. But, we also have recognized the need for a more systematic effort to enhance NEPA's performance throughout the federal government.

Following an exhaustive analysis of NEPA's implementation in the past, we launched the NEPA Reinvention Project, applying those findings to agency activities through a series of pilot projects. We were poised to expand the Reinvention Project but, regrettably, were forced instead to suspend the effort when Congress withheld the necessary resources. We remain firmly committed to the project's goals and wish to engage Congress in a constructive dialogue concerning how best to proceed with this effort.

I am extremely proud of the progress we have made in reinventing NEPA and would like to review some of the highlights, beginning with successes in our day-to-day administration of the statute.

#### *Overseeing NEPA Implementation*

One of the critical roles assigned to CEQ is overseeing implementation of that part of NEPA that requires agencies to analyze the likely environmental, social and economic effects of any action they propose that has a significant impact on the human environment. Under regulations adopted by CEQ in 1978 and amended in 1986, and regularly updated through guidance to the agencies, this analysis may take the form of an environmental assessment and, when necessary, a detailed environmental impact statement. In any given year, Federal agencies and departments prepare approximately 500 draft, final and supplemental environmental impact statements and 50,000 environmental assessments.

In the course of our routine oversight functions, we seek every opportunity to work with agencies to improve the effectiveness of their NEPA implementation. I would like to cite a few examples:

- Working with CEQ, the Food and Drug Administration adopted regulations streamlining its NEPA process that will save taxpayers approximately \$1 million a year and save the pharmaceutical industry an estimated \$15.7 million a year.
- When the Advisory Council on Historic Preservation (ACHP) began rewriting its regulations, CEQ saw an opportunity to reduce redundancy between the requirements of the National Historic Preservation Act and NEPA. Under draft regulations, the ACHP would allow agencies to use their NEPA procedures for public involvement and documentation to satisfy requirements for consultation under the National Historic Preservation Act.
- When Governor Geringer wrote me in June 1997 regarding state and local government cooperation in a federal review of winter use activities in Yellowstone National Park, I asked my staff to work with the National Park Service (NPS) to reconsider its decision not to recognize the state as a cooperating agency. As a result, both the state and Park County, Wyoming, were granted cooperating agency status in the Yellowstone environmental impact statement.
- In New Mexico, CEQ worked with the Bureau of Land Management (BLM) to involve the state and local governments to an unprecedented degree in the preparation of a rangeland programmatic environmental impact statement. This study will form the basis for decision making on rangeland management in New Mexico.
- Over the last eight months, CEQ worked with Senators Chafee, Graham and Wyden to craft an amendment to the Intermodal Surface Transportation Efficiency Act to improve environmental review of transportation projects. The amendment, passed this month by the Senate, requires agencies to integrate environmental review into transportation projects at the earliest possible stage, reducing costly delays and giving the public a stronger voice in transportation planning.

#### *NEPA Effectiveness Study*

In May 1994, CEQ undertook a thorough, candid assessment of NEPA's implementation over the previous quarter-century. *The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years*, published in January 1997, reflects the analysis and opinions of some of the people who know NEPA best and some who are affected by it most.

The "NEPA Effectiveness Study," as it came to be called, found five factors critical to successful NEPA implementation: 1) strategic planning; 2) public information and input; 3) interagency coordination, particularly how well and how early agencies share information and integrate planning responsibilities with other agencies; 4) interdisciplinary and place-based approaches that focus the knowledge and values from a variety of sources on a specific place; 5)

and science-based and flexible environmental management approaches once projects are approved.

The study also identified shortcomings in NEPA's implementation. Some participants said that implementation often focused on the narrow goal of producing legally sufficient environmental documents, that the process is lengthy and costly, and that agencies sometimes make decisions before hearing from affected citizens -- even if a pro forma "public hearing" is held. Other participants noted that NEPA documents are often long and too technical, and that more NEPA training is needed.

#### *Initial Reinvention Efforts*

Following publication of the "Effectiveness" study, CEQ officially launched its focused NEPA Reinvention Project. CEQ identified key personnel to coordinate the project and to engage federal agencies in NEPA improvements. Three phases were planned: the first focusing on specific agencies and issues; the second drawing on those early experiences and applying the lessons to all agencies; and the third focusing on development of incentives for agencies to integrate economic, social and environmental factors into decision making.

The initial focus was planning and decision making related to federal management of oil and gas resources, grazing, and timber uses on public lands. These topics present especially difficult applications of NEPA procedures and are often the subject of controversy and litigation. An Interagency Team lead by CEQ was formed to address NEPA implementation in these three sectors.

The work of the NEPA Interagency Team highlights the importance of using NEPA as a decision making tool so all relevant factors are considered up front. Furthermore, the Team's accomplishments affirmed the importance of sound and participatory natural resource management in the preservation of our history, culture, and environment. Actions to improve NEPA implementation were begun by the NEPA Interagency Reinvention Team. Several are listed below.

1. Common Landscape-Level Planning: As a pilot project, land management agencies (federal, state, local, and/or tribal) were to identify jointly a land use plan of action for federal lands on a common landscape area. Such planning would involve jointly-developed information and shared analyses in determining appropriate management strategies for adoption by specific agencies. The pilot would serve as a model for consideration by federal agencies.
2. Decision Tools: To improve decision making in the management of natural resources, several agencies had begun to develop guidelines and handbooks for managers and technical staff. The Forest Service (USFS) did in fact develop a Decision Protocol, which describes a system for determining the quality and source of required information, the timing of key

decisions in project proposals, implementation steps, and monitoring. Pilot tests of the Protocol within each Forest Service Region are reducing information-gathering costs by as much as 40 percent.

3. Plain English Initiative: Clear, concise communication is crucial for effective public participation in the NEPA process. A document which is easy to understand develops trust, meaningful participation, and a commitment to finding common ground. Results of the project, lead by participants from the National Performance Review (NPR), USFS, BLM, and FWS, will be available through the Internet at the NEPANET web site.

4. Early Coordination With Regulators: Early coordination on EISs and proposals which may have significant impact can avoid costly delays. When a lead federal agency anticipates its decision may have a significant impact on the environment, EPA, FWS, NMFS and COE will be notified and requested to participate in the pre-scoping process. Early coordination will assist agencies in environmental analyses and ensure that relevant environmental concerns are identified and addressed in a timely manner.

5. Electronic Publishing and Data Management: To improve NEPA, the potential to exchange an increasingly larger portion of NEPA-related information on the Internet was being explored.

6. Alternative Dispute Resolution (ADR): Three petroleum companies and the BLM are using ADR techniques and a third-party expert to facilitate EIS work with the Ferron Gas Project in Utah. The proposed action includes approximately 375 new coal bed methane wells on about 96,000 acres. The ADR identifies issues for resolution early in the NEPA process. It was intended that through the NEPA Reinvention Project, the techniques and lessons learned from this pilot would be applied to other projects in the future. The companies involved have found that this ADR is avoiding conflict and saving time.

7. Resource Advisory Councils and State and Local Agencies: Early coordination among the federal agencies often improves the NEPA process. This is especially true when agencies are preparing their initial proposals or reviewing comments from Resource Advisory Councils. The USFS, Natural Resources Conservation Service (NRCS) and other agencies, as appropriate, were to participate with BLM's Resource Advisory Councils to provide input and coordination with BLM. Incorporating expertise and information from state and local agencies in the analysis process will foster decisions that better meet the needs of the community and minimize adverse environmental impacts. BLM in New Mexico is working closely with the State and counties to facilitate their participation in an assessment of public rangeland health issues. The parties have signed formal agreements supporting a cooperative approach. The experiences gained could serve as a model to improve future decision making.

8. Interagency Collaboration in Managing Timber: The appropriate management of timber within and among several adjacent land owners requires comprehensive consideration of specific social, economic, and environmental conditions. Often, these considerations are aided by

collaboration among local, state, federal, and tribal governments. In addition, private landowners and users of public lands often provide important information for the development of specific actions to address forest health, project design, environmental mitigation, and other timber-related topics. Early collaboration provides a means to reach consensus that a specific timber-related action is needed at the location and time proposed. Several cooperative models and collaborative processes among agencies are underway within the USFS and BLM. Communication of successful models and evaluation and critique of less successful models could provide valuable information.

9. Timber Harvest Monitoring: BLM, USFS, EPA, FWS and NMFS were developing guidance for multi-year, large-scale effectiveness and validation monitoring of timber sales and other vegetation management projects which include associated road construction or reconstruction. Procedures were to identify required monitoring and record keeping in NEPA analyses. Research scientists and other specialists were to assist in developing monitoring strategies to ensure that results are considered in future planning.

#### *Planned Next Steps in NEPA Reinvention*

Our initial efforts were well received by a wide range of parties, including Western governors, the Western States Foundation, many Congressmen and Senators, and several state universities we have consulted. All encouraged us to take the effort to the next level and launch a comprehensive and sustained reinvention effort.

Building on the lessons learned in the initial phase, the Interagency Team formed Task Teams to address training, measurement of performance, integration of NEPA in strategic planning, and information exchange through the Internet. The Task Teams had begun to develop specific recommendations to improve the implementation of NEPA among all federal agencies.

Increasing the project's scope, however, required an expansion of resources. Because the limited resources available to the agency in Fiscal Year 1997 were needed for our ongoing NEPA policy development, coordination and dispute resolution responsibilities, and because the amount of staff approved for the organization was already less than half of the level that existed at the end of the Bush Administration, cutting into existing staff resources to support the Reinvention Project was not a realistic option.

As a result, the Administration proposed a Fiscal Year 1998 budget increase of \$584,000 to be used principally for the Reinvention Project. The purpose of the request, and the consequence of not providing it, were clearly communicated to Appropriations subcommittees and to all relevant parties. Nonetheless, the appropriations increase we ultimately received (\$64,000) fell far short of our request and was clearly insufficient to support this effort. A further legislative restriction, added at the last moment, preventing CEQ from using agency detailees dealt an additional blow to the project. Accordingly, in the face of this lack of support from

Congress, CEQ had no choice but to suspend the NEPA Reinvention Projection at the end of Fiscal Year 1997.

*Status of Reinvention*

I remain committed to improving the implementation of NEPA generally and to the objectives of the NEPA Reinvention Project in particular. As a result, CEQ is again requesting in its Fiscal Year 1999 budget that Congress provide the modest but necessary resources to support a more fundamental approach to reinventing NEPA. I would welcome an opportunity to explore a revival of the NEPA Reinvention Project with interested Members of Congress.

In the interim, federal agencies, we hope, will continue exploring ways to improve NEPA implementation on their own initiative in a comprehensive fashion, while CEQ continues to insist on improved NEPA application on an issue-by-issue basis.

We are proud of each instance in which we have cut red tape, reduced the time it takes to comply with environmental processes, brought local interests to the table for a more effective role in the decision making process and helped federal agencies resolve conflicts among themselves. We look forward to the opportunity to continue our reinvention of NEPA so that CEQ, and the entire federal family, can better serve the environment, ensure the economic and social integrity of our communities and engage the American public.

In conclusion, I would like to quote from an article by Lynton Caldwell in the current issue of *The Harvard Environmental Law Review*. In his thoughtful analysis of NEPA's achievements to date, and its power to shape environmental policy in the future, Dr. Caldwell reminds us just how fundamental this statute is to our nation's well-being. "NEPA," he writes, "may be regarded, in effect, as a constitution for the environment -- principles to guide the nation toward an enhanced quality of life and an enduring environmental future."

Indeed, NEPA sets out both our highest ideals and a blueprint for meeting them. It is a privilege to join others who have worked so hard over the years to fulfill the mission declared by Congress nearly 30 years ago. And it is my sincere hope that those who follow will find a NEPA invigorated and strengthened by our efforts.

GALE A. NORTON  
Attorney General  
MARTHA PHILLIPS ALLBRIGHT  
Chief Deputy Attorney General  
RICHARD A. WESTFALL  
Solicitor General

STATE OF COLORADO  
DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING  
1525 Sherman Street - 5th Floor  
Denver, Colorado 80203  
Phone (303) 866-4500  
FAX (303) 866-5691

**Testimony of Gale Norton  
Attorney General of Colorado  
Before the House Committee on Resources  
Oversight Hearing on the National Environmental Policy Act**

March 18, 1998

Introduction

I want to thank the committee for this opportunity to discuss issues relating to the National Environmental Policy Act. I think NEPA is a good piece of legislation that has lost its way during its implementation. With changes, however, it can accomplish what it was intended to accomplish, that is, having the state and federal governments work together to find and implement the proper balance between protecting the environment and achieving other societal goals.

I will focus today on the federalism issues of NEPA. I am familiar with both the state and federal perspectives on environmental and natural resources issues. During my seven years as Colorado Attorney General, I have been personally involved in working to ensure that we have a thorough clean-up of hazardous and radioactive wastes at Rocky Flats and the Rocky Mountain Arsenal, and I was selected by my fellow state Attorneys General as chair of the National Association of Attorneys General Environment Committee. During the Reagan Administration, I served in the Department of the Interior as Associate Solicitor for Conservation and Wildlife. In addition, I am currently the national chair of a new organization, the Coalition of Republican Environmental Advocates.

#### History of NEPA

The National Environmental Policy Act, 42 U.S.C. sections 4321 to 4370a, was enacted by Congress in 1969 and signed into law by President Richard Nixon on January 1, 1970. The Act reflected a widespread public desire to address concerns over the worsening state of the environment. The "grandmother" of all environmental legislation, the Act was intended to set out the policy of the federal government regulating and taking action in the environmental area.

NEPA inaugurated a decade of massive environmental legislation, which included the Clean Air Act, the Clean Water Act, the Endangered Species Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act. During that decade, numerous federal agencies and entities were created, or given authority, to implement environmental regulation and policy, including the Environmental Protection Agency, the Council on Environmental Quality, the Department of the Interior, the Forest Service, and the Corps of Engineers.



The purpose of NEPA was to set out an environmental policy that would be implemented by the federal government in cooperation with the states and local governments. Under NEPA, implementation of that policy occurs through reports done by the CEQ on the environment and environmental protection and through a process by which federal agencies, in cooperation with state and local governments, analyze the impacts of their actions on the environment and other societal values.

Today, environmental impact statements and environmental assessments are a routine part of the planning process for any process undertaken by the federal government or that requires a federal approval. The EPA Office of Federal Activities recently described the statistical picture of NEPA analysis. Of the final EISs filed in 1996, the longest had 1638 pages of text, while the average was 572 pages, including 204 pages of NEPA analysis. Although an average of only 508 EISs were prepared each year between 1990 and 1995, the Council on Environmental Quality estimated that about 50,000 EAs were being prepared annually.

The environmental policy to be implemented by the federal government was set out in section 101 of NEPA. Section 101 reads in relevant part as follows:

The Congress .... declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations.

Several principles are obvious from this declaration: (1) Congress intended for state, local and federal governments to form a partnership to protect the environment; (2) Congress intended that the Act result in interagency cooperation in making decisions regarding the environmental impacts of federal actions; and, most important, (3) Congress intended that national environmental policy consist of a reasonable balance between environmental protection and other societal goals. Somewhere along the line, these principles have eroded, both in the implementation of NEPA and in the implementation of environmental laws in general.

#### State-Federal Partnerships

The original goal of NEPA and of many other environmental statutes was to forge a federal-state partnership in protecting the environment. In NEPA, state and local governments were to have an essential part in determining the environmental and societal impacts of federal actions. This state-federal partnership has worked well in some instances. The US Department of Transportation has allowed the Colorado Department of Transportation to play a significant, or even primary, role in preparation of some environmental impact statements.

On the other hand, states have often found themselves at odds with the federal government when the issue involves public lands -- an issue that is critically important to western states. This is not what Congress intended when it began the "environmental decade" and it must be changed for the sake of the environment. To remedy this problem, Senator Craig Thomas recently introduced S. 1176, the State and Local Government Participation Act, which would amend NEPA to specifically require federal agencies to cooperate with states and counties.

Innovative environmental policies, just like other innovative policies, come about when the states act as "laboratories of democracy." For example, in Colorado, we have enacted a voluntary self-audit statute. That statute encourages more clean-up and more prevention of environmental harm, at no additional cost to the taxpayer. Rather than congratulating the State for its innovative approach to environmental policy, the federal government, and EPA in particular, has waged a war against the law because it conflicts with agency policy. (I testified March 17th before the House Commerce Committee about environmental self-audit laws, and would be happy to provide this committee with more information upon request.)

In addition to innovative policies, the states are important in the federal-state environmental partnership because there is no such thing as a one-size-fits-all government. The states, where government is closer to the people, are the proper entities to implement environmental laws and policies.

Further, after NEPA declared national environmental policy, Congress intended and wrote the concept of "state primacy" into all subsequent major federal environmental statutes. The Clean Water Act, for example, states a policy "to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." 33 U.S.C. section 1251(b). The federal agencies, such as EPA, often pay lip service to state primacy, but in practice, the agencies have mastered the art of "mission creep," using their budgets and authorities to micromanage the 50 states. That approach is not just bad policy: it defies the will of Congress as expressed in NEPA and the subsequent environmental statutes.

To return to the original intent of Congress in NEPA and so many other environmental statutes, I recommend that Congress start the devolution of authority in the environmental area back to the States by amending NEPA. Specifically, Congress should require that agencies consult at an early stage with state and local governments in developing

environmental impact statements. It should be clear in NEPA that an environmental impact statement is not adequate if it does not address fully state and local concerns.

#### Interagency Cooperation

A second important principle contained in NEPA is cooperation between federal agencies in determining and implementing federal policy. In the almost 30 years since NEPA was signed into law, there has been a massive proliferation of federal environmental requirements, as contained in statutes and regulations and agency policies. Regulated sources are subject to numerous, often conflicting, agency approvals processes.

I would recommend that Congress consider amending NEPA to better serve as a vehicle for early identification of federal requirements for projects and for consolidated approvals of those projects. Specifically, NEPA should be amended to require that the primary federal agency taking an action must identify the other federal agencies that must be involved in, or approve a project. There should then be a process set out for all the agencies to work together in an expeditious manner to either approve or disapprove the project.

#### Balancing Societal Needs

The most significant challenge set out in NEPA is that government must strive to find the proper balance between environmental protection and other societal needs. We certainly need a clean and healthy environment. Americans applaud the advancements in clean air and water made since NEPA and other key environmental statutes went into effect. We also need a productive society that fulfills the social and economic needs of present and future generations. Congress in NEPA recognized that the state, local and federal

governments must attempt to balance all of these needs in implementing environmental policy.

Amending NEPA alone will not bring a total balance to environmental policies, but it is a start. I recommend two changes in this area. First, we must ensure that all societal needs and impacts are identified in the NEPA information-gathering process. If the Forest Service is going to deny an easement for an existing water project, we need to understand not only the environmental impacts, but also the impacts on the way of life of local communities and on their economic productivity.

Second, we must use the information collected and analysis done in the NEPA process to identify potential conflicts and initiate a process to resolve them. For example, the NEPA process may identify a potential conflict between the local community and a federal agency proposing a project. Amendments to NEPA might require that some conflict resolution mechanism be initiated at that point to resolve the conflict.

In short, collecting information and analyzing societal impacts is desirable, but only if the information is used to make well-reasoned and balanced decisions about federal actions.

#### Conclusion

In conclusion, I would suggest that the policy set out in NEPA thirty years ago is a good one -- protect the environment while balancing that protection with other societal needs and goals. Thirty years later, we have sometimes strayed from that policy. The best thing we can do for the citizens and the environment is to return to that original vision.



1301 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, D.C. 20004  
(202) 347-5355 Fax: (202) 737-4086

## ***PUBLIC LANDS COUNCIL***

Statement of Michael Byrne  
Vice-Chairman, Federal Lands Committee  
National Cattlemen's Beef Association  
Director, California Public Lands Council

Submitted to  
The U.S. House of Representatives  
Committee on Resources  
March 18, 1998

Mr. Chairman and Members of the Committee:

### **INTRODUCTION:**

I am Michael Byrne, Vice-Chairman of the National Cattlemen's Beef Association's Federal Lands Committee and the Director of the California Public Lands Council. My brother and I ranch in a family partnership in Northern California and Southern Oregon on a fourth generation cattle ranch.

Thank you for the opportunity to testify today. I would like at this time to submit written testimony for the record on behalf of the Public Lands Council, which represents the National Cattlemen's Beef Association, the American Sheep Industry Association, and the Association of National Grasslands.

I would like to utilize the time allotted me today to state my general observations about the National Environmental Policy Act (NEPA) process and to express some of the difficulties facing federal lands ranchers that have arisen as a result of application of the NEPA. I will also provide some examples of situations my fellow ranchers have experienced that will best illustrate the need for change and, finally, I will express some much-needed suggestions for change.

### **GENERAL COMMENTS:**

I wish to begin by saying that I have no doubt that the intentions behind the NEPA process were good. The vision encompassed in the NEPA is that all federal agencies would work together to achieve "productive harmony" among our environmental, economic, and social objectives." It is also my understanding that the purpose of the NEPA initiative was to give a voice to the various interests represented in the decision-making process. It is my belief that the NEPA has fallen far short of these goals in many respects. Furthermore, it concerns me that as recently as January 1997, the Council on Environmental Quality, the agency charged with overseeing NEPA implementation, published a report extolling NEPA as a success. I guess it depends on who you ask.

But in my business, NEPA analysis is considered a broken process because of endless delays caused by lawsuits and administrative appeals, and endless new interpretations of what is needed

to fulfill NEPA's mandates. Implementation of NEPA with respect to ranching operations has created a lengthy regulatory maze imposing a heavy economic burden on the ranching industry. In my opinion, the NEPA process has become a redundant exercise in document production resulting in limited on-the-ground implementation of resource management which is robbing the public of the its intended benefits.

More importantly, the way NEPA is currently being administered is subverting the whole purpose of the Act. In the original Congressional declaration of intent for NEPA, Congress stated that it is the policy of the federal government to "... create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Instead, NEPA has evolved from a national policy designed to protect the integrity of the environment into an unbridled regulatory apparatus which subordinates the economic needs of the community to agency preferences for resource preservation. This situation causes uncertainty and apprehension in the ranching community.

I will now share a brief summary of my own experience to help illustrate my statements. My brother and I have an allotment on Forest Service Lands on the Modoc National Forest in Region 5, which exists primarily in California. Our allotment is home to threatened and endangered species (ESA), wild horses and archaeological sites, which means that our Forest Service allotment is subject to overlapping regulation by a number of different agencies applying a number of different and overlapping statutes.

What this has meant for us is that the environmental assessment (EA) that was developed by the U.S. Forest Service (USFS) for our allotment management plan (AMP) has been essentially superseded by the biological opinion (BO) of the U.S. Fish and Wildlife Service to ostensibly take care of their ESA concerns. Why? Because the USFWS did not agree with the USFS's biological assessment, even though the author of the USFWS opinion has never been to visit our allotment. The USFWS was invited to participate in the NEPA process for our allotment from the very beginning, but chose not to substantially participate until they "trumped" our AMP after five years of work involving a multitude of interested parties. Eventually, after involving the deputy regional directors of both the USFS and the USFWS, this issue was resolved. Unfortunately, this same scenario has occurred in numerous other NEPA analyses across the West.

Currently, we have an AMP which has been signed by the USFS. An environmental group appealed the AMP decision, and that appeal was rejected. At this point, implementation has begun, but is not yet finished. Since our allotment was classified as "high priority," eight years ago my brother and I volunteered to be one of the first permittees to develop an AMP with the USFS in order to develop a model process that could be used for the rest of the forest allotments. To give you a good feel for how long this process has taken, here is a summary of the activities that have been undertaken since this process began in the Fall of 1990—almost 8 years ago.

Fall 1990: Initiated original EA; discussed with District Ranger and prioritized allotments.

Summer 1991-2: Forest Service Eco-data Team does allotment data collection. Team consists of : an ecologist; a hydrologist; a range scientist; a botanist; and an ecological unit team leader.

September 1993: Cost-share assistance provided by local water users to hire a private consultant for 36 miles of stream surveys, greenline surveys. Rosgen stream classifications, fish population counts, width to depth ratios, pool depths, cobble inventories, temperature, dissolved oxygen, Ph levels, electrical conductivity, and cow/fish modeling.

October 1993-4: USFS "ID" Team meetings occur to write the EA. A different private consultant hired to write EA at the direction of the ID Team, which was funded by a cost-share grant between the Modoc County Cattlemen, Modoc County Farm Bureau, University of California Extension Service, and the USFS. Process included numerous field trips and preparation and discussions of alternatives.

September 1994: USFS begins Section 7 consultation on sucker fish with Fish and Wildlife Service. Because the allotments exists in two separate watersheds, the consultation process requires coordination with the California Cattlemen Association, California Farm Bureau, USFS, USFWS in both Sacramento and Portland, and the new Klamath Basin Ecosystem Restoration Office. During the interim period, USFS implemented very restrictive interim standards to accommodate USFWS demands during consultation.

Late Summer 1995: FWS issues a one-year Biological Opinion. Consultation is re-initiated on a long term BO, this time with my brother and I having applicant status.

May 1995: Modoc County Board of Supervisors adopted USFS Biological Assessment which was supposed to be considered by Federal agencies.

June 1995: As part of an EPA grant, in coordination with the Lava Beds Resource Conservation District, the USFS received funding to build fences on USFS land within our grazing allotment.

August 1995: Recissions bill provided for automatic permit renewal.

June 1996: Received grant to build fence to keep wild horses out of riparian areas

June 1996: Archaeological surveys were begun. These surveys were required under an Historical Preservation Act Memorandum of Understanding between National Historic Preservation Office, the state of California, and the USFS and had to be completed before allotment improvements could be installed.

June 1996: Hosted a field trip with Deputy Regional Director of USFWS and Deputy Regional Forester to examine allotment to remedy a disagreement between USFS and FWS on the BO.



June 21, 1996: Final Biological Opinion signed by USFS.

I want to state for the record that the USFS, in my opinion, worked very hard for many years to complete the EA for our AMP and, simultaneously, to develop a process that could be used on other allotments. In my judgment, the fact that this process took seven years to complete and involved a huge expenditure of human capital and taxpayer resources is unconscionable.

#### SUGGESTIONS FOR CHANGE

My own experience with the NEPA process suggests that it is time for Congress to clarify its original intent to the agencies and the courts so that NEPA can be applied as it was supposed to be, instead of today's morass of delay and bureaucratic red tape. Currently, qualified range managers are tied up in the office with paperwork and endless coordination meetings with other agencies instead of being on the ground, managing the resource.

I am not here to argue about whether NEPA analysis should or should not apply to a specific grazing decision or whether the process is biased towards uses other than grazing. The fact is that most ranchers are already good stewards of the land and are dedicated to working within the regulatory constraints of the Act to demonstrate their good management to the American public.

The USFS has estimated the cost of managing the forests and completing the NEPA work as currently interpreted as more than double the current range management budget. Instead of doubling the agency's budget to fund a broken process, let's fix the process. The public's right to participate in decisions about the use of its public lands can be accomplished without the expenditure of an obscene amount of funds.

NEPA has turned into a money black hole for the land management agencies. We are funding a process. The process has taken control. We are more concerned with complying with process than we are of managing the resource or of making sure the American public's concerns are addressed.

However, the procedural mechanism of the NEPA is in dire need of overhaul. The following is a list of some positive suggestions for change:

#### REGULATORY OVERLAP MUST BE ELIMINATED

Overlap of regulatory statutes should be eliminated and consistent and coordinated application of the Act among agencies should be mandated. Duplication of regulatory efforts involving multiple agencies leads to unpredictability and unnecessary costs and delay. The process should be amended to eliminate multiple analysis of the same allotment. Under the present system, it is not uncommon for a rancher to spend over two years working with the USFS or BLM toward completion of an AMP EA only to have the USFWS come along and change everything with its BO, effectively changing the completed EA and potentially delaying any action for an indeterminable time, not to mention increasing the cost of the project.

Agencies should coordinate efforts and the Act should be applied consistently. Under the present system, each federal agency interprets and applies NEPA differently. For example, an agency can build a fence almost immediately, but another agency may have to wait out two years of public comment for yet another agency to sign off on the fence. Regulatory overlap and inconsistent interpretation and application of the Act by the various agencies makes planning and good management nearly impossible. I suggest the "Red Book" approach be extended to include the ranching industry in the same manner it is applied to the transportation industry on the basis that the implications of prolonged delay in the NEPA process can be the cause of financial ruin for ranchers. Allotments should be considered "in sum" and allotment renewals should be exempt from the process. Agencies should be required to work cooperatively from one set of data incorporating all the science necessary to meet the requirements of all applicable regulatory statutes. The process has been effectively streamlined for other industries such as transportation and the same streamlined process should be applied to the ranching industry.

#### PUBLIC PARTICIPATION FOR MINOR RANGE ACTIVITIES SHOULD BE ELIMINATED

The public participation requirement extends the public involvement invitation to include anyone "interested" in any livestock management action occurring on federal lands including actions such as fence-building and other minor range improvements that arguably have little impact on the resource. This broad-scale public participation mandate ties the hands of the ranchers attempting to make wise stewardship management decisions regarding a rancher's own business. The public involvement requirement should be re-evaluated to preclude the "interested public" from interfering with minor management decisions and to allow for addressing minor use activities at the local level where competent land managers, trained to make these types of decisions within the framework of the management plan, will provide more effective site specific management decisions.

Under the present system, the "interested" public comment carries as much weight as the rancher who stands in a contractual relationship with the government. I suggest the rancher be given a special status (similar to "applicant" status under the ESA) whereby more weight is given to the rancher's input regarding management of contracted allotments. The rancher, who has a much greater investment, knowledge of the allotment, and is contractually bound should have a greater influence in ultimate decisions than the average "interested" party when it comes to managing his allotments.

#### THE NEPA APPEAL PROCESS SHOULD BE RECONSIDERED

The number of frivolous NEPA appeals is increasing despite the opportunity for increased public participation at earlier stages of the allotment management process. The result of more appeals is delay, expense and exhaustive record production that have no positive affect on resource management. For example, under the current grazing regulations, any member of the "interested public" may become involved in the decisionmaking process for any action relating to the management of livestock including activities such as issuing, renewing and modifying permits or leases, evaluating and interpreting monitoring data, increasing and decreasing permitted use, and

developing activity plans and range improvement programs. The theory behind including the larger public in these decisions early in the process is that it supposedly will result in fewer protests and appeals. However, the result has been just the opposite.

This nondiscriminatory public involvement has increased the number of appeals. For example, the Idaho BLM office figures show that the number of appeals has steadily increased from 10 appeals in 1994 to 65 appeals in 1997. The estimated cost of BLM resources for each appeal in its Idaho office averages roughly 21 working days and could involve as many as five to ten individuals at an average cost of \$250 per day or \$5,250 per appeal, not including administrative costs. Using these estimates, it is clear that the cost to the federal government in defending appeals is increasing significantly from \$52,500 in 1994 to \$341,250 in 1997 in just one regional office. But, the effects of the increasing number of appeals goes much farther than that. I believe the threat of appeal is driving the cumbersome NEPA evaluation process resulting in endless scientific tests, analysis, documentation and explanation in efforts to create an exhaustive record that will withstand an almost inevitable appeal.

We now know that opening up the planning process to everyone at every level is NOT reducing the number of frivolous appeals. In my judgment, now would be an appropriate time to limit the situations in which NEPA analysis is required to the forest plan level (for the USFS) and the land management plan level (for the BLM). If that were to happen, then all members of the public could continue to have opportunities to appeal decisions, but on-the-ground activities would not be hamstrung as they are currently. All relevant issues should be addressed by the land management agencies at those levels, but site-specific decisions (like where to locate a fence, for example), should be left to the local agency personnel as long as it complies with the guidelines with the applicable plan.

#### CONGRESS NEEDS TO ACT IN ORDER TO ALLOW THE FOREST SERVICE TO MEET ITS 1995 RECISSIONS ACT MANDATE

The 1995 Recissions Act (Section 504(a) of Public Law 104-19) required the Forest Service to come up with a schedule for completing NEPA analysis for all grazing permits due to expire prior to 1996. As I understand it, the agency has completed less than half of these, including EA's that were in progress before the law was passed. Most of the responsibility for this enormous task fell to the field employees where the site-specific analysis was to take place. Currently, most of these field employees are spending their days sitting behind desks, doing paperwork or attending interagency meetings. For all of the reasons I have set forth above, it is unlikely that the USFS will complete this mandate without Congressional action. My preference would be for Congress to clarify, through legislation, how NEPA should be implemented to bring some sanity to the existing craziness that the agencies are engaged in. Short of that, Congress needs to specifically target USFS appropriations to finish this project.

#### BOTTOM LINE

NEPA is a procedural law designed to ensure that actions of federal agencies are balanced between the needs of man and the environment by allowing everyone to voice their concerns in

the decisionmaking process. Currently, we are so caught up in the process that we are forgetting about the bigger picture, which is that public lands are being held in trust by the government for the benefit of all Americans. Right now, the American public and the resources are not being well-served by the current NEPA process.

#### CONCLUSION

This concludes my testimony. The National Cattlemen's Beef Association and California Public Lands council wish to thank Chairman Young for the opportunity to testify here today. I would be happy to answer any questions that you or other Members of the Committee may have.



## United States Department of the Interior

BUREAU OF LAND MANAGEMENT  
Washington, D.C. 20240

JAN 30 1998

4100 (220)

Honorable Larry E. Craig  
United States Senate  
Washington, D.C. 20510

Dear Senator Craig:

Thank you for your letter of November 24, 1997, regarding the Bureau of Land Management's (BLM) definition of "affected interest" and the cost to process appeals from affected interests. It is not possible to provide an exact figure, but we will try to give you an estimate of the BLM resources typically required to process an appeal.

In the 1995 regulation revisions, the term "interested public" replaced the term "affected interest" in the existing rules. Interested public means an individual, group or organization that has submitted a written request to the authorized officer to be provided an opportunity to be involved in the decisionmaking process for the management of livestock grazing on specific grazing allotments or has submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment.

A principal goal in adopting the change was to clarify that the "interested public" will be notified of all proposed rangeland management decisions in order to involve the public in an early stage of the decisionmaking process. Under the previous rule, "affected interests" were notified of the development of allotment management plans or proposed decisions on permits and leases. The 1995 rule provides for notification to the "interested public." By involving the interested public early in the decisionmaking process on activities such as issuing, renewing and modifying permits or leases, evaluating and interpreting monitoring data, increasing and decreasing permitted use, and developing activity plans and range improvement programs, there should be fewer protests and appeals because the parties will have a better understanding of the final decision and the factors considered in reaching the decision.

The determination of whether a person has "standing" to appeal a final decision of the authorized officer was not changed by the 1995 grazing regulations. Any person whose interest is "adversely affected" by a final decision of the authorized officer may appeal the decision. The Office of Hearings and Appeals makes the determination of whether a party is "adversely affected" and thus has standing to bring an appeal.

Since the determination of whether a person has "standing" to appeal a final decision of the authorized officer was not changed by the 1995 regulations, the costs associated with processing appeals should not be directly affected by the 1995 regulations. However, if the number of appeals increases because of more public interest in the management of public rangelands, then total costs may increase. That may be the case in Idaho. The number of appeals in Idaho in 1994, 1995, 1996, and 1997 were 10, 4, 6, and 65, respectively.

The resources required to process each appeal may vary considerably. However, in Idaho, a normal appeal is estimated to require a BLM employee investment of about 21 work days and could involve as many as five to ten individuals (range clerks, range conservationists, area and district managers, and State office personnel). At an average cost of \$250 per work day, the labor cost would be \$5,250 per appeal. There is also the expense of duplicating documents and mailing administrative materials as well as tracking the appeals. We are not able to state more precisely how much appeals from affected interests have cost the Department in administrative fees in Idaho, since our accounting system does not permit us to capture the cost of appeals in isolation from the rest of our range management activities.

I hope that the broad description of resources typically required to process an appeal is helpful. If I can be of further assistance, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Pat Shea", with a stylized flourish at the end.

Pat Shea  
Director

YEAR	APPEALS	COST
1994	10	52500
1995	4	21000
1996	6	31500
1997	65	341250

16 March, 1998

To: U.S. House of Representatives  
Committee on Resources

From: Lynn Scarlett  
Reason Public Policy Institute  
3415 S. Sepulveda Blvd.  
Suite 400  
Los Angeles, CA 93014  
310-391-2245

Topical Outline  
National Environmental Policy Act Oversight Hearing

I. Brief State of the Problem

- \* On one hand, tool for delay and project stoppage: lack of balance
- \* On other hand, lack of follow through monitoring & evaluation
- focus on compliance v. improvements/results
- \* Finally, implementation issues: costs, time, lack of coordination

II. Reinvention Progress & Limits

A. Promise

- \* DOE actions: evaluation, time line goals, categorical exclusions
- \* CEQ reinvention actions: ADR, integration, guidelines

B. Limits

- \* FHWA experience: coordination problems
- \* Forest Service record

IV. Options and Statutory Considerations

A. Restatement of Problem

- \* agency integration & issue scoping
- \* public participation
- \* monitoring & evaluation

B. Recommendations for Change

- \* ADR by requirement
- \* Clarity on "significant"

V. Limits of Change

- \* NEPA vs. other statute goals, boundaries, focus
- \* Other agency structure and internal incentives



Testimony before:

Committee on Resources  
U.S. House of Representatives

1324 Longworth House Office Building  
Washington, DC 20515  
202-225-2761

By:

Lynn Scarlett  
Executive Director  
Reason Public Policy Institute  
Los Angeles, CA

## I. Introduction

Thank you, Mr. Chairman and members of the House Resources Committee, for providing this opportunity to review citizen experiences with the National Environmental Policy Act. My name is Lynn Scarlett. I am Executive Director of Reason Public Policy Institute in Los Angeles, a nonprofit research and educational organization. For over a decade, I have studied and evaluated various environmental and land-use policies in the United States. I am here today not as a practitioner involved directly in NEPA procedures but as an analyst who has reviewed the record of NEPA within various agencies and in general.

## II. NEPA: Brief Statement of the Issues

At its inception three decades ago, the National Environmental Policy Act was in several ways unique. First, unlike other environmental laws passed in the years that followed, NEPA explicitly set forth a goal of balancing environmental values with other social and economic values, using language such as "productive harmony" between "man and nature" and emphasizing the importance of environmental, social, and economic requirements. Second, unlike other environmental statutes, NEPA took a "big picture" approach, requiring that agencies examine the web of environmental impacts that might be associated with federal projects and activities rather than focusing on single-medium impacts. Third, NEPA was not prescriptive: it attempted to establish procedures through which environmental values could be more systematically considered by federal agencies in project planning and decisions. Balance, a holistic perspective, and the prospect of flexible responses all characterized NEPA in concept.

In practice, NEPA has not always fulfilled its promise, having unleashed some unintended consequences and procedural inefficiencies.

On the one hand, some of its critics note its use by some citizen groups, as a tool to delay and stop projects altogether rather than to improve them and mitigate environmental harms. Use of NEPA in this way has not been uniform across all federal projects but, instead, has been more evident in a few particularly contentious areas such as highway projects, mining projects, and forest management. Highway projects, for example, often take from two to eight years to complete the NEPA and related permitting processes. Critics of these delays view NEPA as having moved away from its vision of balance to one in which a particular set of environmental values has eclipsed other values or concerns.

On the other hand, many agencies have only reluctantly engaged in the NEPA process, seeing it as one more law with which they must comply, but not viewing NEPA as an integral part of their planning and decision making process. The result of this compliance attitude has been a failure to take seriously the information that emerges through preparation of environmental impact statements. Project choices are essentially decided before the EIS process has been completed, and EIS results then fail to result in project modifications. Equally important, once the project is under way, little or no ongoing monitoring and evaluation of environmental impacts occurs that, if done, might allow for ongoing mitigations, adjustments, or improvements.

This failure is especially important to the focus of today's hearings--citizen experience. Citizens who participate in the EIS review process often have an opportunity to comment only after a project alternative has been selected. Their participation is, thus, minimal in any meaningful sense.

There is a third problem with NEPA as practiced: the review process can be time-consuming and costly--sometimes without any clear benefits emerging as a consequence of the time and effort spent. Within the Department of Energy, for example, until recent changes were enacted, the median time for completing an EIS was nearly three years. But the median figure understates the problem. For individual projects, the EIS process sometimes has taken six or more years.

Documents have often included hundreds of pages, often in arcane and technical jargon inaccessible to the general public. One study of the typical language used in environmental impact reports concluded that the reports were geared to a reader with a college degree or higher.

### III. Reinvention Progress and Limits

None of these criticisms of the NEPA process is new. Over the last decade the Council on Environmental Quality (CEQ) and various federal agencies have been acutely aware of the cumbersome, costly, inefficient, and time-consuming nature of the NEPA process. Self-criticism has abounded. In its most recent assessment of NEPA, the CEQ underscored problems in timeliness, lack of coordination among multiple agencies involved in a single project, lack of robust public participation, and lack of ongoing evaluation or monitoring.

This self-reflection has yielded numerous attempts at reinvention, both spearheaded by CEQ and undertaken by individual agencies. Notable among these efforts has been the deliberate attempt by the Department of Energy (DOE) to streamline its NEPA processes. Specifically, the DOE has carefully evaluated the circumstances under which an EIS is appropriate and has delineated specific areas for "categorical exclusion" to avoid lengthy evaluations where impacts can be expected to be minimal. Equally important, the DOE set specific goals for reducing the median time line to 15 months and tracks both costs and time lines for all environmental assessments (EAs) and EISs. Moreover, the cost and time information is published and available to the public in easily accessible form.

This effort by the DOE has some positive results. The common wisdom that "what gets measured gets done" is accurate in the case of the DOE. By setting specific time line goals, and publishing performance in meeting those goals, agency decision makers have a stronger incentive to move the NEPA process forward in order to meet the agency's stated goals. Since implementing its reinvention procedures, DOE's record has improved--median completion times have dropped from nearly three years to under twenty months.

The CEQ has also embarked on various reinvention measures. The focus of CEQ efforts has been primarily on increasing public access, eliminating redundancies, better integrating NEPA processes into agency missions, improving information and monitoring, and improving interagency coordination. In its 1997 report on NEPA effectiveness, the CEQ concluded that "overall, what we found is that NEPA is a success--it has made agencies take a hard look at the potential environmental consequences of their actions and it has brought the public into the agency decision-making process like no other statute." Despite this praise, the report also concludes that the process takes too long and costs too much; documents are too complex for easy use by various publics; and some agencies do not fully integrate the NEPA process into their overall decision making.

CEQ has also been more aggressive in attempting to resolve interagency disputes and general conflicts. In several instances, it has used alternative dispute resolution (ADR) techniques of negotiation and mediation to resolve project disputes.

CEQ and others have argued that administrative reinvention, including use of CEQ in the role of facilitator, are sufficient to overcome NEPA problems, with legislative action being unnecessary. However, several factors make such a conclusion perhaps overly optimistic.

For example, while the DOE has successfully "reinvented" itself with notable results, and CEQ has successfully intervened in several disputes, experience in individual agencies is less inspiring and reinvention implementation is inconsistent.

A GAO report on the Federal Highway Administration found that despite reinvention efforts to streamline highway reviews, barriers exist that can limit the success of these efforts. In particular, lack of clarity on how to evaluate cumulative impacts continues to plague reviews. And ongoing coordination among multiple agencies requires staff commitments that are not always given priority.

A GAO report on the Forest Service showed 1) a lack of ongoing monitoring and evaluation of projects; 2) a tendency to engage in costly "overvaluation" to avoid any potential litigation; and 3) to bring the public into the decision making only late in the process--a practice still maintained in its current NEPA guidance. Finally, the report notes that so-called tiered evaluations linking specific project evaluations to broader site-wide or ecosystem evaluations are done only sporadically. They are allowed, but not required.

#### IV. Options and Statutory Considerations

**Restatement of Problem.** As many as seventy federal agencies are subject to NEPA process requirements. In any given project, sometimes as many as thirty public agencies from federal, state, local, and tribal governments may be involved in the review process. The number of potential participants in the NEPA process for any given project opens up substantial prospect for conflict and delays.

While some of these agencies have succeeded in coordinating the timing of the EIS process with other project permit processes, and some have succeeded in coordinating their input early on in the review scoping, these efforts are not required, and there are no mechanisms to enforce coordination and cooperation. Nor are there systematic means of resolving disputes. It is not clear that altering CEQ guidelines or other administrative efforts can accomplish consistent coordination and conflict resolution.

Second, the existing NEPA statute does not establish clear requirements for public participation during the up front or scoping process. Nor are clear limits set regarding the nature and timing of public input--with the result that uncertainty and time delays with late public input sometimes occurs.

Third, current law has no clear requirements for agencies to report either costs or length of time to complete EAs and EISs on an average and/or median basis. Elsewhere among several states, time-reporting requirements for other permitting processes have resulted in substantial improvements in expediting permit processes. NEPA has no parallel requirements, though individual agencies like the DOE do engage in such reporting.

Fourth, substantial ongoing disputes and conflict continue over scoping and focus of NEPA reviews. While individual agencies have developed categorical exclusions, greater clarity on "what counts" and "what doesn't" may reduce litigation and delays.

**Recommendations for Change.** Congress may wish to consider establishing requirements for negotiation, mediation, and conflict resolution. Currently, alternative dispute resolution (ADR) tools are available to CEQ and agencies involved in NEPA reviews. However, use of such tools is sporadic and serendipity. Moreover, there is no mechanism to require participation in conflict resolution. An ADR process might not only establish procedures for early public input into scoping and other NEPA steps, but also set forth procedures for determining a proposed participant's standing in a particular matter.

One suggestion for changes to New York's State Environmental Quality Review Act (SEQRA) may also be worth considering. That proposal was to establish that review of SEQRA decisions use a standard less deferential than the "arbitrary and capricious" standard and, instead, use a "reasonableness" standard to determine if an EIS would be affirmed or remanded for modification and further review. This same SEQRA reform proposal indicated that once a reviewing body--however established and designated--affirmed a document, its determinations would be subject to only very limited judicial challenge, including for charges of fraud, misconduct, and so on.

Such a process would benefit both citizens and project planners. The up front participation requirements would bring interested citizens into the decision process much earlier than at present; the dispute resolution requirements and limitations on post-decision judicial challenges would create conditions of greater certainty. The up front participation requirements would also create a clear mechanism for agency coordination to ensure that key issues are raised early on in the decision process.

Note that the above concept is presented in very broad brush, concept form only. I present it as an option that Congress may wish to consider as a supplement to the reinvention efforts already being undertaken by the CEQ and individual agencies. These voluntary efforts, including several initiated by the CEQ, have shown substantial promise. CEQ managed to resolve a highway dispute in Atlanta over five proposed projects. In another instance, a stalemate over dredging at the Port of New York and New Jersey was resolved through an ADR-type process.

A second option Congress may wish to consider is that of cost and timing information disclosure. Such disclosure is currently permissible but not required. Several states have begun to experiment with such disclosure in other environmental permitting processes. The State of Oklahoma, for example, publishes permit status and the length of time permit applications have been under review for various environmental permits. The information also publishes the particular lead officer charged with processing a particular permit. The result of this mere publication of permit times has resulted in substantial reductions in permitting delays. While not perfectly applicable to the NEPA circumstance, the concept of disclosure of such information may create some incentive by project decision makers to expedite proceedings and limit review to essential issues, helping to counter the incentive some now have to "over evaluate."

Other options, such as that proposed by the GAO with respect to requiring "tiering" of reports where relevant may also improve the "holistic" nature of the NEPA process while also over time reducing costs and duplication of effort.

#### V. Limits of Change

No change of NEPA can entirely resolve some of the problems its procedures invoke. And no change of NEPA will result in all of the hoped-for environmental benefits that its architects and current champions envision. There is one fundamental reason for these limitations.

Some agencies, by their mission and current structure, face internal agency incentives that work against integrating economic and environmental protection goals. For example, funding arrangements of the Forest Service discourage forest managers from undertaking some conservation measures and encourage them from promoting other uneconomic and environmentally damaging practices. NEPA processes can identify the impacts of certain proposed projects but cannot change the internal incentives faced by the agency and which drive decisions. This incentive problem is well-documented in much public-choice literature on park service management, forestry management, and so on.

Improving NEPA both to streamline it and to build it more into a problem-solving rather than compliance-focused process may help "harmonize" economic, social, and environmental values, as the original statute set out to accomplish, and may yield some environmental and efficiency improvements. But some of these improvements will be limited unless parallel changes in incentive structures within individual agencies are also undertaken.

## Lynn Scarlett

Lynn Scarlett is Executive Director of the Reason Public Policy Institute and Vice President for Research at the Reason Foundation, a Los Angeles-based public policy research organization. Ms. Scarlett oversees all the Institute's policy research. That research includes a focus on issues pertaining to education, infrastructure, urban land use and economic development, environmental quality, and privatization. Her own research focuses primarily on environmental issues, with a particular emphasis on solid and hazardous waste, recycling, urban air quality, environmental risk issues, and market-based environmental policy.

Ms. Scarlett received her Masters Degree in Political Science from University of California, Santa Barbara, where she also completed her Ph.D. course work and exams in political economy and political science. She was also a graduate fellow at the Generva Institute of International Studies.

Scarlett is the author of numerous articles on environmental policy, privatization, and local economic development published in both academic and general-audience publications. Her general-audience articles have appeared in Wall Street Journal, Los Angeles Times, Reader's Digest, and numerous other newspapers and magazines. She has appeared frequently on national television and radio talk shows to discuss environmental policy.

Since 1993, Ms. Scarlett has served as Chair of the "How Clean Is Clean" Working Group of the Washington, D.C.-based National Environmental Policy Institute, founded by former Cong. Don Ritter (R-PA). She served as a member of the Enterprise for the Environment Task Force, a year-long project chaired by former EPA Administrator William Ruckelshaus.

In 1994, Ms. Scarlett was appointed by Gov. Pete Wilson to chair California's interim Inspection & Maintenance Review Committee, charged with making recommendations on revising the state's vehicle smog check program. She was reappointed in 1996 to chair the permanent committee. She is currently part of a special consulting team to California's Department of Conservation charged with evaluating the state's container recycling law.

Ms. Scarlett was a reviewer for Project 88, a project sponsored by the late Sen. John Heinz and former Sen. Tim Wirth. The project evaluated market-based environmental policy options. Ms. Scarlett also served from 1992-94 as Advisor to the Houghton-Mifflin "Encyclopedia of the Environment" project and contributed the entry on source reduction.

Ms. Scarlett served as an expert panelist for two satellite video conferences sponsored by the U.S. Environmental Protection Agency on variable-rate fees and full-cost accounting for solid waste service. She also served as Technical Advisor to the Solid Waste Association of North

America's Integrated Waste Management Project.

Most recently, Ms. Scarlett coauthored a report, *Race to the Top*, which describes various environmental innovations at the state level being undertaken by state regulators to introduce flexibility and a problem-solving focus into environmental management programs.



**TIM J. LEFTWICH**  
GL Environmental, Inc.

U.S. House of Representatives  
Committee on Resources

NEPA Testimony

## INTRODUCTION

Members of the mining and other natural resource industries have become increasingly concerned and frustrated by the uneven-handed application of the National Environmental Policy Act (NEPA) to new project development. More than any other regulatory approval process, NEPA has resulted in large project cost over runs and lengthy delays. During the past decade project approval times have steadily increased from several months to several years. It has become more and more apparent that federal agencies charged with NEPA implementation are less able to do so in a reasonable timeframe.

## KEY NEPA ISSUES

A number of problems associated with the NEPA process have surfaced in the last several years, however, the mining industry has identified key issues that reoccur on a regular basis. A discussion of those issues follows.

### Issue 1

A primary concern of many companies undergoing the NEPA process is the long timeframes. This problem seems to particularly affect industries that have self-initiated projects that usually involve at least some public land and requires interaction with other laws or regulatory approvals. There are numerous reasons for the increasingly long delays. Some of the more significant ones include:

- Lack of a clear understanding of the NEPA process by either the agency or the proponent or both
- Inability to properly manage the process either because of inadequate staffing or management skills
- During initial scoping a lack of focus on the issues that have significant resource implications and inability to limit alternatives to those that make sense.
- The elevation of project significance from an environmental assessment with a Finding of No Significant Impact to an Environmental Impact Statement

### Issue 2

Directly linked to the increased time to complete NEPA is the large cost escalation. Several reasons have been cited (Delcour, 1997):

- Lead agency unwillingness to control the process thus being unduly influenced by the

various cooperating agencies

- An attempt to answer every potential impact to an unreasonable degree in the draft EIS in an effort to preempt public comment
- The fear of litigation driving the unreasonable level of baseline data collection
- Lack of agency technical expertise or other resources to adequately collect baseline or direct the collection of baseline and review and comment on the NEPA documentation in a timely manner

### Issue 3

An almost universal issue being raised by the natural resource industries is the oversight role the Environmental Protection Agency plays in the NEPA process. Specifically, it is felt that the EPA, in many instances, is reluctant to get involved at the beginning of a particular NEPA action but instead waits until near the end of the process and then interjects new concerns that result in additional studies or analysis to resolve. There also appears to be a wide variation in the EPA approach from region to region. In many cases the EPA reviews are superficial and reflect a lack of understanding of the particular project or industry practices in general. Comments prepared by EPA are often not received until after the comment period has closed.

### Issue 4

A common thread weaving through NEPA issues is the unwillingness or inability of the lead agency to take a clear leadership role and manage NEPA implementation. Many agencies are unable to devote adequate resources and some simply do not budget for NEPA activities. This results in decision avoidance and a growing dependency on the use of outside contractors to complete the necessary tasks in many cases paid for the project proponent. Other problems associated with agency leadership include:

- Use of third party contractors paid for by the applicant invites criticism of the process
- A lack of agencies viewing NEPA as a priority concern therefore not providing direction and resources to adequately respond to CEQ regulations.
- Ineffective methods of handling public participation throughout the NEPA process by not dismissing frivolous comment meant as a delaying tactic and focusing on project impacts.

### Issue 5

The lack of predictability of the ultimate cost and time required to get through the NEPA process has created a large degree of uncertainty on the part of the agencies and the applicant as to when NEPA should be implemented. In an attempt to collapse timeframes, many applicants start data collection before NEPA has been formally initiated. Because scoping has usually not been completed, this approach can cause delays due to inadequate baseline collection and lack of focus on key issues. Agencies are reluctant to commit resources until an application had been submitted that will

formally trigger the NEPA process. Therefore, tensions begin to build around the NEPA process early in the life of a project and often result in a lack of close communication and coordination between the applicant and the agency.

## **ISSUE RESOLUTION**

### **Clearly Define Lead Agency Role**

Many of the problems associated with expeditiously getting through the NEPA process would be solved if lead agencies clearly understood their role and the role of cooperating agencies. CEQ regulations provide that lead agencies have the ultimate authority to resolve disputes with cooperating agencies, but requires the lead agency "to adequately consider" cooperating agencies concerns or the EIS could be considered inadequate. Given these regulatory guidelines, it is understandable that lead agencies go to great lengths to consider and incorporate cooperating agencies comments, often to the point of bringing the process to a halt.

The NEPA process by its very nature analyzes the potential impacts of an action on many components of the environment. It is the task of the lead agency to weigh the overall environmental affects of a project in context of the current land use plans. This charge particularly applies to surface management agencies that have a multiple use charter for public lands. In many cases, cooperating agencies that have a narrower, specific resource management mission use the NEPA process to advance their agendas and are allowed to do so by the lead agency. CEQ regulations should make it clear that information from the cooperating agencies should be used to aid in making environmentally well informed decisions. Lead agencies should exercise their responsibility to objectively evaluate the information provided by cooperating agencies and resolving conflicts as they are encountered.

The lead agency should identify all cooperating agencies that should be included in a given NEPA action and enter into a Memorandum of Understanding (MOU) prior to initiating the NEPA process. The MOU should clearly define the role of the cooperating agencies and their contributions to the project. Cooperating agencies should include those agencies that are using the NEPA document to satisfy their requirements for NEPA analysis for permitting purposes under other regulatory programs (e.g. US Fish and Wildlife Service for ESA issues) and advisory agencies that provide technical expertise for specific resources. The MOU should contain language that clearly conveys the multiple use mandates of the lead agency and should describe a method of conflict resolution that will conform to the lead agency mandates.

Ultimately, the responsibility of implementing and managing the NEPA process rests with the lead agency. Agencies with this requirement should develop and implement a plan for conducting NEPA analysis and commit the necessary resources to insure this capability.

### **Adherence to a Schedule and Budget**

Currently, the open ended time horizon and uncontrolled costs associated with NEPA implementation are major disincentives to new mining industry projects. The time required for a typical mining project to get through the NEPA process ranges from 18 months to 36 months or longer. Costs consistently range into the millions of dollars.

In spite of the Council on Environmental Quality's suggestion that "even large complex energy projects would require only about 12 months for the completion of the entire EIS process" many agencies automatically assume that the process will be multi-year. The idea that enforceable time limits be imposed on the NEPA process is being strongly promoted by several industry sectors (Delcour 1997). Although there are no regulatory consequences for not meeting agreed upon time frames, CEQ regulations encourage agencies to enter into voluntary agreements to complete environmental impact statements within negotiated time frames. Imposing time limits and the automatic issuance of a favorable record of decision if time limits are exceeded would require a change in the stature.

There are, however, administrative procedures that could be adopted that would reduce time frames and provide for fiscal accountability. In the initial stages of the NEPA process a project schedule with specific milestones for various tasks negotiated by the lead agency and the applicant would add a degree of certainty to the process. Based on the complexity of the EIS, a budget could be agreed to and monitored throughout the process. Adjustments to both the time lines and budget could be made if circumstances dictate, but adherence to the original schedule and budget should be the goal of both the agency and the applicant. Currently, agency requirements for additional studies cost time and money. There should be a strong justification for requiring additional tasks that are outside the scope of the schedule and budget.

The successful implementation of NEPA within specified time frames and within a budget will require a good understanding of the process by both agency staff and the applicant. In many cases training in project management is necessary for all parties involved. Integration of other regulatory requirements such as Clean Air Act and Clean Water Act permits must be addressed during the project scheduling to avoid delays later in the process. With a strong commitment to adhere to the schedule, time frames can be collapsed and the NEPA requirements satisfied.

The decision to prepare an Environmental Impact Statement instead of an Environmental Assessment can also add significant costs and extended time frames. The agency elevation of a project to an EIS status should be based on potential impacts to the environment and not on political pressures from within the agency or from other agencies or special interest groups. A "Finding of No Significant Impact" following the completion of an environmental assessment should be given the same weight of NEPA compliance as a

Record of Decision as a result of an EIS.

#### **Reform the Role of EPA**

A general consensus among many of the mining industry companies with recent NEPA experience is the need to reform the oversight role of the Environmental Protection Agency. 42 U. S. C. Sec. 7609 requires the Environmental Protection Agency to comment on all environmental impact statements. Because of this requirement, the EPA has been reluctant to involve itself early in the NEPA process. As a result, both the applicant and the lead agency managers feel that EPA raises new issues and objections late in the process. This practice invariably leads to delays and additional costs. In an effort to anticipate the EPA's level of involvement, the lead agency managers attempt to address every conceivable environmental issue rather than the significant ones identified during scoping. This leads to a seemingly endless loop of lead agency managers imposing delay and expense on the NEPA process in an effort to avoid the EPA threat of even more delay and expense.

At least two solutions to this particular issue have been identified. One would be to change the statutory requirement that the EPA comment on all environmental impact statements. While this action would resolve the issue, it is politically practical. Another means would be to have EPA participate earlier in the process. The place to provide for such a requirement would be the CEQ regulations, however it certainly would be within EPA's existing authority to voluntarily participate earlier. EPA's earlier involvement and constructive participation would not compromise its statutory duty to review environmental impact statements.

#### **Summary**

There is an increasing discontent with NEPA implementation among the natural resource industries, governmental agencies, and the general public. Environmental Impact Statements take too much time to complete and are not cost effective. An inordinate amount of resources are spent examining insignificant issues and significant issues are often analyzed far beyond any reasonable requirements of the statute or the CEQ regulations. Public participation frequently leads to an inappropriate mix of technical and policy questions. Cooperating agencies and the EPA sometimes attempt to impose their own policy views on lead agency decision making and the lead agency often loses management control of the process.

It is evident that meaningful reform will not be possible without the active participation of Council on Environmental Quality. Issues related to inter-agency disagreement are unlikely to be resolved without changes in the CEQ regulations. There are, however, administrative practices that could be adopted that would shorten the NEPA process and reduce costs. Surface management agencies currently have the authority to commit to reasonable negotiated timetables and budgets at the beginning of a project and to assign the appropriate priority level in terms of money, staff, and training to NEPA

implementation.

U.S. House of Representatives  
Committee on Resources  
NEPA Oversight Hearings

Testimony of Tim Leftwich



## CONCEPTUAL MINING PROJECT PERI

#	Task Name	Start	Duration	End	Days	AS	1	2	3	4	5	6	7	8	9	10	11	12
DEVELOPMENT PROJECT ENVIRONMENTAL SCHEDULE																		
1	PROJECT START DATE	8/1/95	197.9w	8/1/99														
2	ENGINEERING DESIGN	8/1/95	0d	8/1/95														
3	PRE-FEASIBILITY (CONCEPTUAL DESIGN)	8/1/95	77.9w	1/24/97														
4	FEASIBILITY (TECH REVIEW DESIGN)	4/29/96	270ed	1/24/97	3													
5	DETAIL DESIGN (POST TECH REVIEW)	1/24/97	0d	1/24/97	4													
6	BASELINE DATA COLLECTION	4/29/96	118.9w	8/7/98														
7	GEOLOGY/MINERALOGY	4/29/96	51.9w	4/24/97	3													
8	LOCAL/REGIONAL	4/29/96	30ed	7/28/96	3													
9	PIT WALLS	4/29/96	30ed	5/29/96	3													
10	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
11	GEOCHEMICAL CHARACTERIZATION	4/29/96	51.9w	4/24/97	3													
12	ORE	4/29/96	90ed	7/28/96	3													
13	OVERBURDEN	4/29/96	180ed	10/29/96	3													
14	TAILINGS	4/29/96	90ed	7/28/96	3													
15	PIT LAKE	4/29/96	180ed	10/29/96	3													
16	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
17	WATER RESOURCES	4/29/96	52.2w	4/29/97	3													
18	SURFACE WATER QUALITY/QUANTITY	4/29/96	365ed	4/29/97	3													
19	GROUNDWATER QUALITY/QUANTITY	4/29/96	365ed	4/29/97	3													
20	DEWATERING	4/29/96	180ed	10/29/96	3													
21	DEWATER DISPOSAL	4/29/96	90ed	7/28/96	3													
22	FLOW MODEL	4/29/96	180ed	10/29/96	3													
23	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
24	SOILS	4/29/96	51.9w	4/24/97	3													
25	ORDER II INVENTORY	4/29/96	90ed	7/28/96	3													
26	GROWTH MEDIUM SUITABILITY	4/29/96	90ed	7/28/96	3													
27	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
28	VEGETATION	4/29/96	51.9w	4/24/97	3													
29	INVENTORY TYPE / SPECIES	4/29/96	120ed	8/27/96	3													
30	PRODUCTION DATA	4/29/96	90ed	7/28/96	3													
31	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
32	LAND USE	4/29/96	51.9w	4/24/97	3													
33	GRAZING	4/29/96	60ed	8/28/96	3													
34	POWS	4/29/96	30ed	5/29/96	3													
35	RECREATION/WILDERNESS	4/29/96	30ed	5/29/96	3													
36	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
37	WATERS OF THE U.S.-WETLANDS	4/29/96	51.9w	4/24/97	3													
38	JURISDICTIONAL DELINEATION	4/29/96	30ed	5/29/96	3													
39	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
40	WILDLIFE	4/29/96	51.9w	4/24/97	3													
41	TERRESTRIAL	4/29/96	90ed	7/28/96	3													
42	AQUATICS	4/29/96	90ed	7/28/96	3													
43	FISHERIES	4/29/96	90ed	7/28/96	3													
44	AVIAN	4/29/96	90ed	7/28/96	3													
45	RISK ASSESSMENT	4/29/96	180ed	10/29/96	3													
46	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
47	ENDANGERED SPECIES	4/29/96	51.9w	4/24/97	3													
48	INVENTORY	4/29/96	30ed	5/29/96	3													
49	ASSESSMENT	4/29/96	30ed	5/29/96	3													
50	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
51	AIR QUALITY	4/29/96	94.8w	2/19/98	3													
52	MONITORING	4/29/96	365ed	4/29/97	3													
53	MODELING	1/12/97	90ed	2/19/98	144													
54	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
55	AESTHETICS	4/24/96	12.9w	7/23/96														
56	VISUAL	4/24/96	60ed	6/23/96	223,224													
57	NOISE	4/24/96	90ed	7/23/96	223,224													
58	CULTURAL RESOURCES	4/29/96	118.4w	7/22/98	3													
59	ARCHAEOLOGICAL INVENTORY	4/29/96	90ed	7/28/96	3													
60	SUBMIT REPORT	4/24/97	0d	4/24/97	4FS+90ed													
61	NATIVE AMERICAN CONSULTATION	12/24/97	60ed	2/22/98	213													
62	PALEONTOLOGICAL ASSESSMENT	4/29/96	60ed	6/28/96	3													
63	SECTION 106 PROCESS	12/24/97	90ed	3/24/98	213													
64	MITIGATION	5/22/98	30ed	7/22/98	63FS+90ed													
65	SOCIAL AND ECONOMIC RESOURCES	8/9/96	8.9w	8/7/96														
66	ASSESSMENT	8/9/96	60ed	8/7/96	224,225													
67	TRANSPORTATION	8/9/96	4.4w	7/6/96														
68	ASSESSMENT	8/9/96	30ed	7/6/96	224,225													
69	FINAL INTERNAL REVIEW-BASELINE REPORTS	5/26/97	8.9w	7/26/97														
70	REVISIONS	5/26/97	60ed	7/25/97	4FS+120ed													
71	SUBMITTAL TO AGENCIES	7/25/97	0d	7/25/97	70													
72	PERMITTING	8/1/96	197.9w	8/18/99														

Date: 11/13/95

Task

Critical Task

Progress

Date: 11/13/95

Task

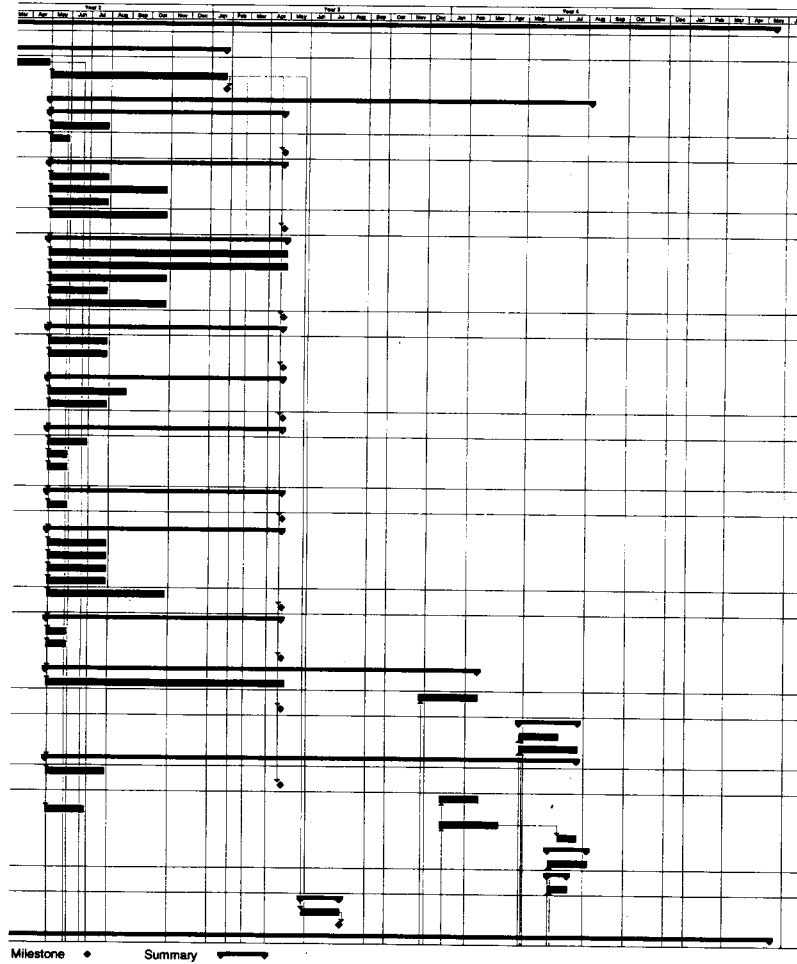
Critical Task

Progress



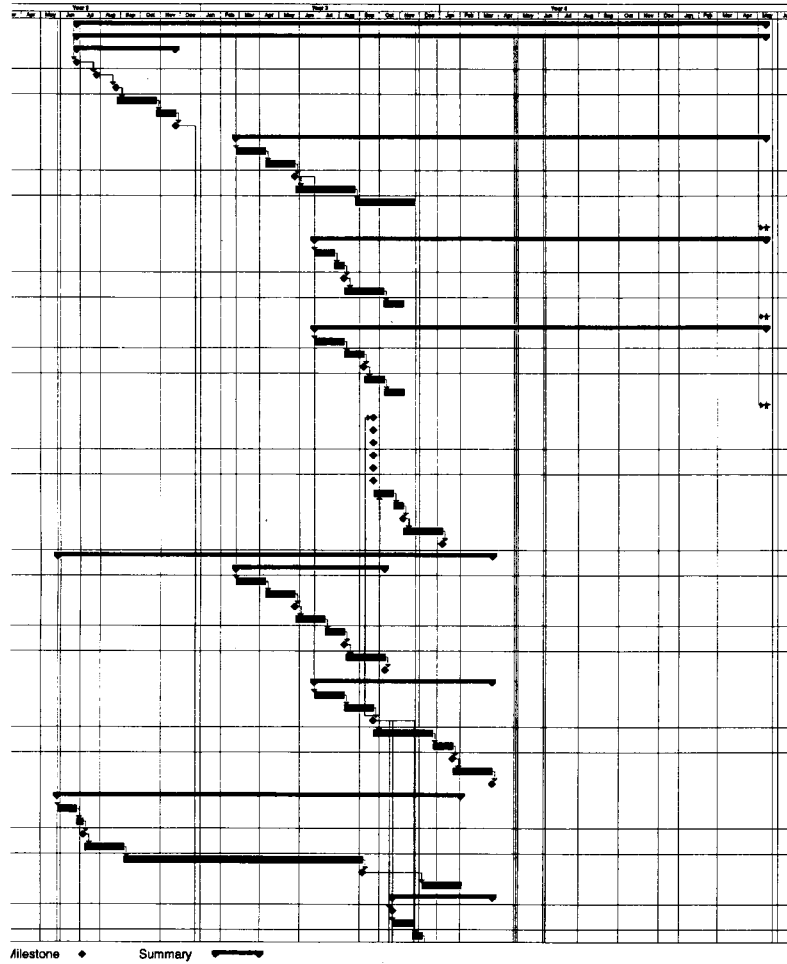


## MITTING PROCESS AND SCHEDULE



Date: 11/13/95 Task ☐ Critical Task ☐ Progress ☐

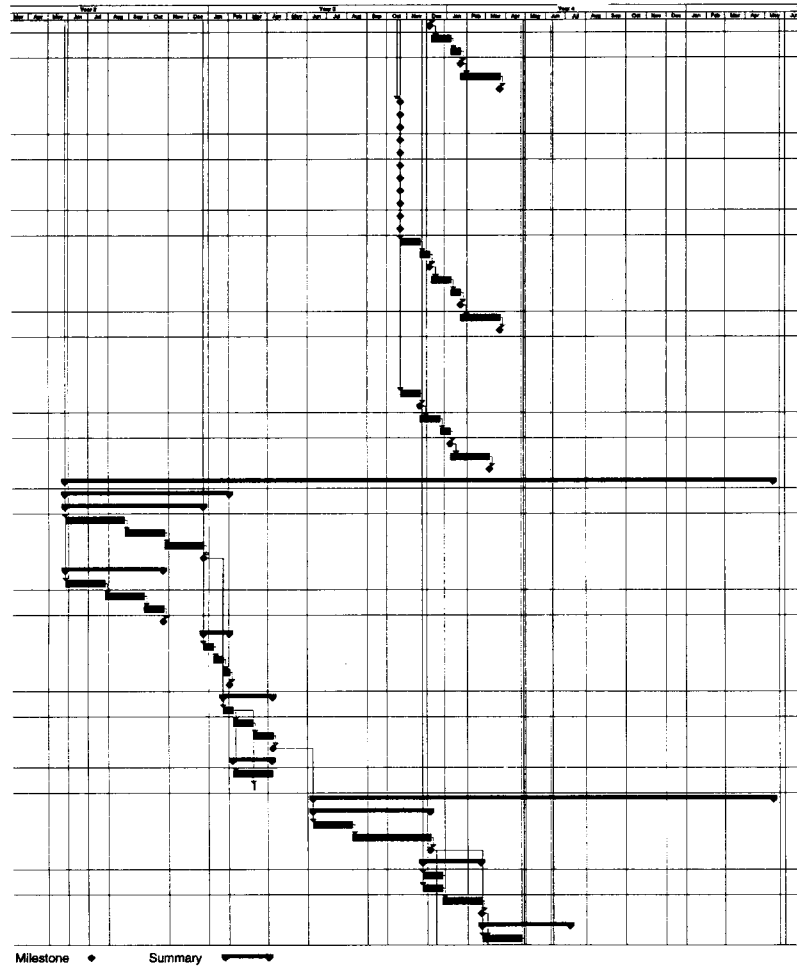
## MITTING PROCESS AND SCHEDULE



Date: 11/13/95

Task	Critical Task	Progress
1. Develop project charter		100%
2. Identify stakeholders		100%
3. Define project scope		100%
4. Create WBS		100%
5. Estimate resources		100%
6. Develop schedule		100%
7. Identify risks		100%
8. Develop communication plan		100%
9. Obtain approval		100%
10. Launch project		100%

# MITTING PROCESS AND SCHEDULE



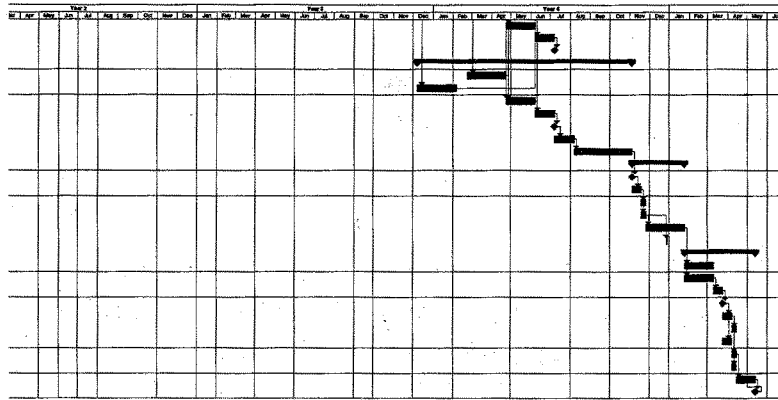
## CONCEPTUAL MINING PROJECT PERMITS

Task	Task Name	Start	Finish	Days	Predecessor	Successor
100	AGENCY / SFRG REVIEW	4/24/98	4/26/98	6/8/98	210	
101	REVISIONS	6/9/98	30nd	7/8/98	219	
102	AGENCY APPROVAL		0d	7/8/98	220	
103	PRELIMINARY DRAFT EIS (D018)	12/8/97	47.6w	11/8/98		
104	PROJECT DESCRIPTION AND ALTERNATIVES	2/23/98	60nd	4/24/98	216	
105	DESCRIPTION OF AFFECTED ENVIRONMENT	12/8/97	30nd	3/8/98	211	
106	IMPACT ASSESSMENT	4/24/98	4/26/98	6/8/98	223,224	
107	INTERDISCIPLINARY REVIEW	6/9/98	30nd	7/8/98	225	
108	SUBMIT TO AGENCY / SFRG	7/8/98	0d	7/8/98	227	
109	REVIEW	7/8/98	30nd	8/7/98	228	
110	REVISIONS	8/7/98	90nd	11/5/98	228	
111	DRAFT EIS (D018)	11/5/98	11.4w	1/28/99		
112	AGENCY ACCEPTANCE	11/5/98	0d	11/5/98	229	
113	PRINTING	11/5/98	2w	11/18/98	231	
114	DISTRIBUTION AND MAILING	11/18/98	1w	11/25/98	232	
115	FEDERAL REGISTER NOTICE	11/18/98	1w	11/25/98	232	
116	PUBLIC COMMENT PERIOD (60 DAYS)	11/25/98	60nd	1/23/99	234	
117	PUBLIC MEETINGS	12/23/98	2nd	12/30/98	234FS-30nd	
118	FINAL EIS (F018)	1/25/99	16w	5/15/99		
119	RESPOND TO COMMENTS	1/25/99	4/26/99	3/11/99	235	
120	PREPARE PRELIMINARY FEIS	1/25/99	4/26/99	3/11/99	236	
121	AGENCY REVIEW / REVISIONS	3/11/99	2w	3/24/99	239	
122	AGENCY ACCEPTANCE	3/24/99	0d	3/24/99	240	
123	PRINTING	3/25/99	2w	4/7/99	241	
124	DISTRIBUTION AND MAILING	4/7/99	1w	4/14/99	242	
125	PREPARE ROD	3/25/99	2w	4/7/99	241	
126	FILE WITH EPA	4/7/99	1w	4/14/99	242	
127	FEDERAL REGISTER NOTICE	4/7/99	1w	4/14/99	242	
128	AVAILABILITY PERIOD	4/15/99	30nd	6/15/99	245	
129	RECORD OF DECISION / PROJECT APPROVAL	5/15/99	0d	5/15/99	247	

Date: 11/13/95

### Task

██████████ Critical Task ██████████ Progress ██████████ M

**MITTING PROCESS AND SCHEDULE**

ilestone ♦ Summary —



National Mining Association  
Foundation For America's Future

## **The National Environmental Policy Act Impact on Public Lands Mineral Development and Options for Reform**

---

*Prepared for the National Mining Association by  
David Delcour*

October 1997



## **1.0 PROJECT SUMMARY AND PURPOSE**

National Mining Association (NMA) members find themselves increasingly frustrated by project delays and escalating costs associated with National Environmental Policy Act (NEPA) compliance. Earlier in the current generation of Nevada gold mines, for example, it was not uncommon for developers to negotiate the NEPA process in a matter of months. Now, two to three years is more common. With the added time comes added cost. Increasingly complex studies are being required.

NMA members wish to systematically examine application of the NEPA process to their projects. Specifically, they seek to identify the features of that process that have led to the frustrations described above. NMA has determined to undertake a survey of recent industry experiences with NEPA through interviews with mining industry personnel, other public land users and public land managers. This report presents the results of that survey and identifies possible NEPA reforms which might address the concerns of the survey participants.

## **2.0 THE SURVEY**

### **2.1 Persons Interviewed**

During the months of April and May 1997 interviews were scheduled with representatives of a number of mining companies, all of which had recent experience with NEPA. The list of interviewees was selected by the National Mining Association. Originally, 27 people, representing 24 companies were identified for interview. During the initial round of calls, however, referrals to six additional persons were made. Of the 33 industry representatives asked to participate in this survey, 20 were interviewed, two were unavailable and 11 did not respond to calls.

In addition to mining industry representatives, interviews were held with six of eight selected public land managers, each of whom had recent experience with mining projects subject to NEPA. Finally, four representatives of two other public land user groups, timber and oil and gas, were interviewed.

To increase the probability of candor, the people selected for interview in this project were assured that they would not be identified in any report; however, it is possible for the report author to contact any individuals whose participation in subsequent phases of this project is desired by the National Mining Association.

### **2.2 Interviews**

With a couple of exceptions, interviews were conducted by phone and generally lasted for 20 to 40 minutes. Mining industry interview subjects were asked a series of questions designed to provide the interviewer with a general understanding of the project which triggered NEPA involvement. Thereafter, questions were asked to elicit information describing the source of land and mineral ownership, the NEPA triggering event, the scoping process, time requirements, costs and preparation of the environmental document which, in nearly all cases, was an environmental impact statement.

After providing project and NEPA process factual information, those interviewed were engaged in a general discussion of the qualitative aspects of their experience. Special emphasis was placed on those

---

aspects of NEPA which worked well and those which did not work well. Interview subjects were invited to suggest reforms that would have made NEPA operate more effectively or more efficiently.

Interviews are summarized in the Appendix. Projects are identified by state and commodity in order to assure the confidentiality promised participants.

Interviews with representatives of other industries and the public land management agencies did not focus on specific projects. Instead, issues raised in the mining industry interviews were presented for comment and response. Representatives of other industries provided insight into their own NEPA problems. Public land managers were refreshingly candid in providing their perspective on their agencies' management of the NEPA process as well as their evaluation of mining industry practices contributing to NEPA problems.

### **2.3 Mining Industry Interview Highlights**

Although the mining industry representatives had a variety of NEPA experiences, a number of points were made repeatedly. They are summarized below.

1. In several instances, the scoping process has not generated criticism. Alternatives developed during scoping tend to be reasonable variations of the companies' proposed actions. Issues identified tend to be ones which the companies have anticipated. In cases where scoping has been troublesome, the problem relates either to the lead agency's inability to bring the scoping process to closure, the lead agency's failure to focus the process on issues critical to the resources to be affected by the project or the lead agency's inability to limit alternatives to those that are viable, reasonable and prudent.
  2. The overwhelming cause of escalating costs and lengthy delays in completing NEPA requirements appears to be an inability on the part of lead agencies to decide when enough information is in hand. Various reasons have been given for this deficiency. Some of the more common ones are: lead agency unwillingness to be assertive with cooperating agencies; a belief that draft environmental impact statements must preempt public comment; excessive fear of litigation; and lack of technical expertise or other resources within the agencies.
  3. The role of cooperating agencies requires revision or, at the very least, clarification. Under the worst circumstances, cooperating agencies have been identified by industry representatives as playing an adversarial role in the NEPA process. More common, however, are situations where cooperating agencies seem unable to reconcile their missions with those of the public land managers who seek to accommodate a wide range of land uses.
  4. Survey respondents were almost unanimously critical of the Environmental Protection Agency's (EPA) oversight role. Most respondents feel that EPA's insistence upon remaining aloof from the NEPA process until the very end is a major contributing factor to delays and unexpected additional studies. Although EPA's approach seems to vary somewhat among its regional offices, most characterized the agency as engaging in ambush tactics. Many reported frustration at their failure to involve EPA earlier in the NEPA process. A number complained that EPA reviews are superficial and that reviewers failed to fully understand their projects before preparing comments which, frequently, were not received until after the comment deadline.
-

5. A number of companies acknowledged that their own actions have significantly contributed to their NEPA problems. The larger number of comments dealt with the consequences of revising their plans of operation after having triggered NEPA. There appears to be considerable uncertainty within the industry as to the best timing for initiating NEPA. Due to the lead time required to complete NEPA, there is pressure to initiate the process as early as possible. On the other hand, the costs and delays associated with major plan revisions suggest initiating the process as late as possible. In addition, several companies indicated that they should have sought to more aggressively work with the agencies to keep the process moving forward including entering into agreements with the agencies on time schedules for completing the NEPA process as allowed under Council on Environmental Quality (CEQ) regulation (40 C.F.R. §1501.8).

6. Some land managers discourage direct communication between project proponents and the third party contractors hired by the agencies to prepare environmental impact statements. Where this has happened, surveyed companies are unanimous in their criticism.

7. Those interviewed believe there needs to be a more constructive way to handle public participation in the NEPA process. Industry representatives were especially critical of the agencies' unwillingness to dismiss frivolous public commentary and of their unwillingness to separate ideological commentary from commentary focused on project specific environmental impacts.

8. Several of the people interviewed feel there needs to be a mechanism for ending baseline and other technical studies. They feel it is too easy for land managers to delay decision making by calling for additional studies. In some cases the situation has been exacerbated by third party contractors who have a financial interest in extending the number and scope of studies.

#### **2.4 Other Industry Interview Highlights**

The forest products industry's experience with NEPA is similar to that of the mining industry with one very important exception. For the mining industry, NEPA normally is triggered by a project proponent's application to the agency. Usually the application is for approval of a plan of operations, but applications for land exchanges, rights of way and similar land uses also can serve as the trigger. The forest products industry rarely is the initiator of NEPA. It is through the land managing agencies' planning process that NEPA usually affects the forest products industry. Only after a Federal Land Policy and Management Act (FLPMA) or National Forest Management Act (NFMA) planning document is made final, following an environmental analysis, will an agency offer timber for sale. As long as the sale has been proposed in the planning document, no further NEPA analysis is required. Accordingly, the forest product industry's participation in NEPA is limited to that of a public commenter. Another notable difference between the forest products industry's and the mining industry's experience is that the land managing agencies always prepare the environmental impact statements for their planning documents. A couple of forest product industry representatives indicated that utilization of third party contractors would be helpful.

Notwithstanding the important difference noted above, the forest products industry has been frustrated by NEPA in many ways that will be familiar to the mining industry. Those interviewed were very critical of the time required to navigate NEPA. The length of the process is attributed to several factors: decision avoidance through excessive analysis; agency insistence on analyzing all imaginable issues rather than limiting their studies to those issues which have significant resource implications; the advocacy role

---

played by single issue agencies; excessive aversion to being sued by citizen activist groups; and lack of adequate standing requirements for appealing records of decision.

Survey responses from the oil and gas industry were quite limited. Nevertheless, the industry's criticism is similar to that expressed by the mining industry. Apparently NEPA is often triggered when there is a flurry of drilling activity proposed for a certain area.

Lower levels of activity still can be permitted with environmental assessments and findings of no significant impact. When an Environmental Impact Statement (EIS) is required, they are done by third party contractors; however, sometimes costs can be shared among several lease holders active in the area subject to NEPA. Completion of an EIS used to take under one year, but recently they have been taking up to 2 ½ years to complete. The oil and gas industry shares the opinion of mining industry interview subjects who are critical of the nature of EPA's role in the NEPA process. Much of the additional time required to complete NEPA is attributed to industry opponents and the agencies' fears of litigation.

### **2.5 Public Land Manager Interview Highlights**

Although public land managers speak from a different perspective than project proponents and do not endorse the criticism of their agencies, a number of their observations are strikingly similar to those expressed in the interviews of industry representatives.

1. Cooperating agencies do not have an adequate understanding of the multiple use mission of the Forest Service and the Bureau of Land Management (BLM), nor do they understand the impact of the Mining Law on agency discretion. Nearly all land managers complained that cooperating agencies try to force projects to advance their agencies' narrow agendas, without regard for the multiple use guidelines which govern the public lands agencies' decision making. A couple of land managers indicated that cooperating agencies see themselves as co-decision makers and as co-authors of environmental impact statements.
  2. Land managers also criticize specialists in their own agencies for the same short-sightedness noted in the above paragraph on cooperating agencies.
  3. Land managers acknowledge that they have become wary of litigation to the point where environmental impact statements are too lengthy, too detailed, too unfocused on critical resource issues, too time consuming and too expensive. One manager said his agency seeks to achieve a 90 to 95 percent confidence level that it will prevail in any challenge to its environmental impact statements and suggested that an 80 percent confidence level should be satisfactory and would greatly reduce the level of analysis now required. In another manifestation of this problem, managers say that they are reluctant to assert proposals will have no impacts on certain resources, resulting in unnecessary studies and a dilution of focus on the resource issues most in need of analysis and impact mitigation.
  4. Land managers would like to see all interested parties put their cards on the table early in the NEPA process. The practice of some environmental groups and EPA to keep their own counsel until commenting on a draft EIS results in land managers trying too hard to anticipate and address all possible reaction in the draft document. They believe a lot of overkill could be eliminated if issues were identified earlier and comments on the draft were kept within a previously agreed scope.
  5. BLM managers, but not Forest Service managers, believe it is too easy to file frivolous appeals and
-

would like to see more rigorous standing requirements imposed.

6. The availability of personnel adequately trained to consider the environmental impacts of mine development varies among the National Forests and BLM districts. Not surprisingly, areas of considerable recent activity feel they have the necessary skills and areas of less recent activity feel they do not. Personnel from both agencies believe the Forest Service's Large Mine Team (agency experts from throughout the agency who are identified on a list and made available on a consulting basis) offers a lot of promise, but that, to date, it has been an under utilized resource.

7. There appears to be a lack of common understanding among land managers as to the proper relationships between a project proponent and a lead agency and between a project proponent and a third party contractor hired to prepare an environmental impact statement for the agency. Land managers seem to agree that maintaining rigid barriers, requiring formal, structured communication lines and requiring all communication to be on the public record does not work very well, but they disagree about the extent to which the law requires such controls.

8. Land managers believe that project proponents could do more to facilitate the NEPA process. The most frequently cited industry shortcomings are: industry's willingness to allow the agency to become the chief defender of an EIS and the proponents' preferred option; industry's unwillingness to make issues go away when there is an inexpensive solution; and industry efforts to compromise the independence of third party EIS contractors.

### **3.0 REFORM PROPOSALS**

Section 2 of this report describes the observations of industry and public land managers who have had recent NEPA experiences. This section will discuss a number of NEPA reform ideas which have been suggested by the observations and experiences described above.

#### **3.1 Impose Enforceable Time Limits on the NEPA Process**

According to the CEQ, "even large complex energy projects would require only about 12 months for the completion of the entire EIS process." Were that to be the case, the mining industry's concerns with the NEPA process likely would vanish. As can be seen from a review of the projects described in the Appendix, a typical mining project requires between 18 and 36 months. Some of the projects required even more time.

A number of the companies interviewed suggested that enforceable time limits be imposed on the NEPA process. CEQ's regulations, while arguing the impossibility of imposing across-the-board time limits, already encourage agencies to enter into voluntary agreements to complete environmental impact statements within negotiated time frames. There appears to be adequate authority for the land managing agencies to commit to time limits in their own regulations and manuals. The dilemma is providing for acceptable consequences when an agency fails to adhere to either negotiated or regulatory time limits. Some states have provided that permits are deemed approved if applications are not acted upon within statutory deadlines. Experience in those states is mixed. While the deadlines impose pressure on the agencies to remain in compliance, the threat of denying a permit within the time limits generally compels project proponents to accept agency requests for extensions.

---

In the NEPA context, automatic issuance of a favorable record of decision when time limits are disregarded would require a change in the statute. In the current political climate it seems almost inconceivable that such a change could be enacted into law. A less radical measure might be a Congressional resolution urging completion of the NEPA process within 12 months and requiring agencies to publish their performance. If NEPA performance could be given the type of attention that airline "on-time" results generate, it is likely that agencies would exert greater effort toward timely completion.

### 3.2 Redefine the Role of Cooperating Agencies

There appears to be a great deal of confusion over the role of cooperating agencies in the NEPA process. CEQ has made it clear that lead agencies have the ultimate authority to resolve disputes with cooperating agencies, but also notes that failure to adequately consider cooperating agency concerns could lead to an EIS being found inadequate. Under these circumstances it should not be surprising that lead agencies go to great lengths to accommodate cooperating agencies, sometimes, as is shown in the Appendix, to the point of allowing the process to become paralyzed.

Survey respondents were particularly critical of what they believed to be cooperating agencies' failure to appreciate the multiple use management charters of the public land agencies. Since cooperating agencies always will have narrower missions than those of the public land agencies, CEQ regulations should make it clear that NEPA is not the proper place for agencies to advance their agendas. Rather, NEPA should develop the information necessary for agencies to make environmentally well informed decisions. The regulations should draw a clear distinction between the conflicting roles of cooperation agencies: (1) contributing their particular expertise to the scope and substance of the environmental analysis; and (2) discharging their own statutory duties relative to permit issuance or enforcement. While the current regulations clearly encourage the former role, they do not specifically preclude the latter.

Lead and cooperating agencies also should be encouraged to prepare and execute a Memorandum of Understanding (MOU) prior to initiating the NEPA process. The MOU would clearly define the role of the cooperating agencies and their expected contributions to the project. The MOU also could define the various agencies based on their needed involvement in the EIS process; that is, "cooperating" agencies would be those agencies that are using the NEPA document to satisfy their requirements for NEPA analysis for permitting purposes (e.g., Corps of Engineers for § 404 permit) and "advisory" agencies would be those agencies whose main purpose is to provide technical expertise in discrete areas. The MOU would highlight the multiple use mandates and restrictions thereunder of the lead land management agency. Conflicts would be resolved in favor of the lead agency's multiple land use mandates.

Unfortunately, there also are risks in narrowing the role of cooperating agencies. By restricting their advocacy during the preparation of environmental impact statements, project proponents could find themselves subjected to multiple environmental analyses of their plans, thereby effectively extending the time required for NEPA compliance. Even worse, agencies who feel they have been ignored during the NEPA process retain the ability to issue or deny permits within their own jurisdictions.

### 3.3 Reform the Role of EPA

42 U.S.C. Sec. 7609 requires the EPA to comment on all environmental impact statements. One of the consequences of this requirement has been to make EPA reluctant to involve itself early in the NEPA

---

process. As a result, both project proponents and public land managers feel that EPA raises new issues and objections so late in the process that accommodating their concerns threatens substantial delay (often including new studies) in the process. To avoid that, land managers tend to address every conceivable environmental issue rather than just the significant ones. The unfortunate irony is that land managers tend to impose delay and expense on the NEPA process in an effort to avoid what they perceive as the threat of even more delay and expense.

It would be tempting to suggest that agencies no longer be required to submit their environmental impact statements to EPA. Since the referral is a statutory mandate, however, it would be more productive to find a device to compel earlier EPA participation. The obvious place to provide for such a requirement would be the CEQ regulations, although it certainly would be within EPA's existing authority to voluntarily participate earlier. Persuading EPA to initiate such a reform on its own motion would require demonstrating that early and constructive participation would not compromise the agency's statutory duty to review environmental impact statements.

### **3.4 Adopt Standard Analyses for EIS Incorporation**

Although the mining industry often argues correctly and persuasively that mines are site specific and that each must be evaluated on its own merits, there are a number of impacts associated with mine development that recur over and over again. While project proponents should always have the opportunity to propose new techniques and technologies, those who propose to replicate technology that has been examined repeatedly in the past should be able to avoid studies and analyses to establish a foregone conclusion.

The industry might consider proposing to the public land agencies the formation of a task force to identify those aspects of mine development which do not need further analysis. Whenever those aspects are incorporated in a project, their environmental impact should not be the subject of additional study unless either the agency or the project proponent believes there to be different impacts. A standard form of analysis could be prepared by the agencies for incorporation into appropriate environmental impact statements.

The risk in this proposal is that the agencies will become too rigid in their application of the standard analyses to the detriment of project proponents. In addition, industry arguments against applying a SMCR type of regulatory regimen to the hardrock sector could be compromised.

### **3.5 Restrict Time When New Issues Can Be Raised**

Although CEQ regulations encourage identification of all significant issues during the scoping process, they impose no restrictions on the injection of new issues later in the process. This matter could be addressed in several ways, all of which may create additional concerns.

1. The EPA review could be split into two phases: review of the scoping document and review of the environmental impact statement. After approval of the scoping document, EPA would be precluded from raising additional issues. Before pursuing this option, research should be undertaken to determine whether or not CEQ has adequate statutory authority to impose such a requirement. While this reform should lead to fewer surprises at the end of the NEPA process, it likely would also make the scoping process more contentious.

---

2. Similarly, public and cooperating agency input on issues requiring study could be formally restricted to the scoping phase of the NEPA process. Were this to be done, comments on the need for additional studies made in connection with a draft EIS could be disregarded by lead agencies. Knowing that the scope of the EIS would be fixed should make it easier for agencies to resist the temptation to address all issues in their draft documents rather than only those deemed significant.

3. The land management agencies should develop policies to disregard public comments directed toward agency policy rather than the technical soundness of the environmental analysis. Comments would still be received on policy questions and the agencies' proposed records of decision; however, the formal agency response to that category of comments could be eliminated, saving time and money.

4. The scoping process would be divided into two tiers: notification and scoping. The "notification" phase would be initiated by publication of a notice of intent in the *Federal Register*, public notice via a brief scoping letter, notice and development of MOUs with cooperating agencies, and other similar matters. The "scoping" phase would be initiated by release of a detailed scoping document that describes (a) known issues that are considered significant, (b) preliminary alternatives to address those issues, (c) other issues that are not considered significant and which will not be examined, and (d) the process by which effects related to the alternatives will be measured or evaluated. This detailed scoping document would be provided to the public for comment and to the EPA for approval, as noted under point 1 above.

### 3.6 National Expertise Should Be More Readily Available

The idea behind the Forest Service's Large Mine Team should be expanded. A similar capability should be developed by BLM. Both agencies should encourage the use of the specialists identified by the two agencies.

To be effective, the Large Mine Team must be utilized. Utilization would be encouraged if the agencies made it clear that Large Mine Team involvement would be under the direction of the local land managers charged with EIS preparation.

The national offices of both the Forest Service and the BLM should also establish a procedure for resolving disputes over the need for additional studies. While the Large Mine Team might have the technical competence to play such a role, that might make land managers less likely to call upon Team members for assistance. It would be better to identify a senior official with minerals management responsibility in each agency to resolve disputes between local managers and project proponents over the need for additional information.

---



### **3.7 Direct Communication Between Project Proponents, Land Managers and Third Party EIS Contractors Should Not Be Discouraged**

There seems to be no persuasive justification for the practice of some public land managers to restrict project proponent communication with either agency personnel or contractors hired by the agencies to prepare environmental impact statements. The concern that such communications prejudice the process by excluding the public would seem invalid in view of the role accorded the public in the regulations and by the courts. In a similar vein, project opponents ought to have access to agency personnel without participation by project proponents.

NMA should urge both the Forest Service and BLM to issue national guidance on this matter.

### **3.8 Limit Alternatives to Reasonable Alternatives**

It is settled law that an agency need consider only reasonable alternatives. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978). An agency is not required to consider every possible alternative when preparing a NEPA document. See, e.g., Lidstone v. Block, 773 F.2d. 1135, 1137 (10th Circ. 1985). The land management agencies should be encouraged to use their expertise and limit the alternatives to be considered in the EIS only to those alternatives that are reasonably related to the proposed project. The lead agencies should be encouraged to dismiss from consideration those alternatives advanced during the scoping process that are not reasonably related to the proposed project.

## **4.0 CONCLUSION**

There is a growing level of dissatisfaction with the application of NEPA to mine development activities. Environmental impact statements require far too much time and examine too many insignificant issues. Significant issues often are analyzed far beyond any reasonable requirements of the statute or the regulations. Public participation frequently leads to an inappropriate combination of technical and policy questions. Cooperating agencies and EPA sometimes seek to impose their own policy views on lead agency decision making.

Meaningful reform will not be possible without the active participation of CEQ. In particular, problems associated with inter-agency disagreement are unlikely to be resolved without being addressed in the CEQ. regulations. Absent the industry's ability to bring about needed reforms in the regulations, however, the land managers do have adequate authority to shorten the NEPA process by adopting standardized analyses of many environmental concerns, by making better use of experts found throughout the agencies and by committing to reasonable timetables at the outset of a project.

---

## Appendix

### COPPER - 1

**Project:**

The project is an open pit, heap leach copper mine in a heavily mined part of its state. The project is adjacent to another company's existing copper mine and access is on a road developed to serve the existing operation. The projected mine life is 18-20 years and the peak work force will be 300 employees, a number equal to recent layoffs at yet another mine in the area. In addition to the mine, the project will include haul roads, waste dumps and leach pads. Diversion of a creek will be required. The company proposes to disturb 300 acres.

**Land Tenure:**

Title to both the mineral land and the nonmineral land is controlled by both patented and unpatented mining claims. The orebody is about 75% covered with patented claims. Surface management for the unpatented claims is under a federal public land management agency.

**NEPA Trigger:**

NEPA was triggered by a plan of operations filed with the public land management agency.

**Scoping Process:**

The company describes scoping as "fairly benign." Very little public opposition was apparent; however, the one vocal opponent has challenged the company's plans at every opportunity. This, coupled with the project being the first proposal for a new mine in the applicable public land unit, has contributed to the cautious approach taken by the agency.

**EIS Preparation:**

The EIS is being prepared by a third party contractor which does extensive NEPA work for the federal government. The company believes the quality of the contractor's work has been of acceptable quality, but notes that the agency frequently has required additional studies. Archeological studies have been a big problem in connection with the project and have cost in excess of \$2 million. In a separate interview, an agency manager complained that industry consultant studies sometimes lack credibility.

The NEPA process began either in February 1992, when the original plan of operations was filed, or in January 1993, with the filing of an amendment to the plan of operations. In either event, the agency did not commit to a schedule for completing an EIS. CU-1

Page 2

In January 1995, the agency published a draft EIS which was pilloried by EPA. Specifically, EPA criticized the draft EIS for failing to consider several smaller mine options or mining elsewhere. As a result,

---

the final EIS is still pending and was expected by the end of May. NEPA compliance costs are between \$7 million and \$8 million.

Relations with the Corps of Engineers and the state permitting agencies were described as excellent. Indeed, the company has obtained all of the necessary state permits to build and operate its mine. Relations with the public land management agency were initially rocky, but have improved dramatically and for the past year are considered by the company to be quite good. In its concern for the length of time being taken to comply with NEPA, the company has sought and received expressions of concern and interest from the state's two United States Senators and the project area's United States Representative.

**Concerns:**

Although the company feels its NEPA compliance costs have been too high, especially considering the amount of existing mining activity in its project area, it is mostly concerned about the time required for compliance. It believes NEPA needs to be subjected to deadlines, and that deadlines negotiated on a project by project basis would make the most sense if they could be made enforceable against the government agencies.

A second major concern pertains to the role of EPA. The company feels that EPA needs to be involved in a constructive role early in the NEPA process and should be limited in its oversight role.

Finally, the company believes that the public land management agency needs to have more technical expertise available to it in order to reduce what it believes to be the agency's excessive demands for additional studies.

---

**COPPER - 2****Project:**

Construction of three new leach pads and a waste rock area at an existing copper mine, mill and smelter complex. The project, which is adjacent to and upgradient from the existing industrialized area, will disturb an additional 1300 acres.

**Land Tenure:**

The project is to be constructed on a combination of private, BLM and Forest Service land. The federally managed lands are controlled by unpatented mining claims.

**NEPA Trigger:**

The company prepared a single plan of operations, seeking to conform to both BLM and Forest Service regulations. As a result of this NEPA trigger, BLM and the Forest Service are joint lead agencies.

An alternative considered by the company was to seek to acquire the public land through a land exchange. This option was rejected because of the pace at which land exchanges have proceeded in the state and the fact that an exchange would still have been subject to NEPA.

**Scoping Process:**

The scoping process seems not to have gone very well. Although the project enjoyed substantial local support, the joint lead agencies used the scoping process to raise theoretical issues the company considered unrelated to the project. Scoping proceeded at a slow pace. The first meeting occurred seven months after the plan of operations was submitted to the agencies.

**EIS Preparation:**

The joint lead agencies selected a third party contractor to prepare the environmental impact statement. The company believes that the contractor has not been adequately assertive with the agencies. In addition, the agencies have sought to control the company's direct contacts with the contractor.

The pace of progress on the EIS has been very slow. Following scoping, a period of one year was spent narrowing 14 alternatives to the three still under consideration, undertaking baseline studies and preparing a state required Aquifer Protection Plan. Now three years after initially submitting a plan of operations, the draft EIS was finally expected by May 1. The final EIS and record of decision were slated for late summer.

The slow pace is attributed to identification of 59 cultural sites, 32 of which are considered eligible for National Register listing. The company contends that most of the sites are of no real cultural significance. More importantly, however, in August 1996, the one of the public land management agencies raised new air quality concerns for the first time. The agency's concerns related to the existing operation's contribution of PM10 to a Class I air shed. The company finally prevailed in its argument that existing operations were governed by a state issued operating permit which would have to be amended

---

should the expansion result in additional atmospheric loading. It is the company's belief that the agency was subverting the NEPA process to resolve its long-standing dispute with the company on air quality issues. As a result of these additional studies, environmental costs on the project have risen to \$2,500 per acre.

**Concerns:**

The company feels the delays it has encountered can be attributed to several factors. One of these is that the land managing agencies feel a need to assure that environmental impact statements are absolutely immune to judicial challenge. Also, one of the agencies insisted on developing its own preferred alternative. Finally, the company believes that too much time was spent dealing with frivolous criticism.

---

**COPPER - 3****Project:**

This project involves the construction of a new 1500 acre tailing pond at an existing copper mine. No expansion of mining or milling facilities are included. The only additional construction involves facilities ancillary to the new tailing pond, including some roads, tailing lines and water reclamation.

**Land Tenure:**

The land was acquired in fee simple by the company from the state at a public auction. Prior to its purchase, the company had leased the land for a number of years.

**NEPA Trigger:**

Since the project will fill 26 acres of dry wash, the company has had to apply for a permit under Section 404 of the Clean Water Act. The Corps of Engineers has determined that the fill will require an individual permit and that application for the permit will trigger NEPA.

**Scoping Process:**

To date there has been no scoping process since the Corps has agreed to prepare an environmental assessment prior to determining whether or not an EIS will be required. In what would appear to be a misstatement of the law, the Corps has told the company that an EIS will be required if enough people object to a finding of no significant impact.

**EIS Preparation:**

As previously noted, an environmental assessment rather than an EIS is currently in preparation. This course of action has been encouraged by the company which desires to avoid the additional time and the extensive public participation associated with preparing an EIS. If the Corps does issue a sustainable finding of no significant impact, the company expects to receive its 404 permit in November, ten months after having made application.

The primary issue of concern associated with the 404 permit is the presence of a threatened plant species. Accordingly the Corps has initiated consultation with the U. S. Fish and Wildlife Service under section 7 of the Endangered Species Act.

Technical work is being undertaken by firms under contract to the company. The biological survey, required by the presence of a threatened plant, has cost more than CU-3

Page 2

\$100,000, an amount the company believes is excessive. The delineation of waters of the United States is being undertaken by a different contractor and that work is not expected to exceed \$15,000, an amount the company considers to be reasonable.

Although only midway through the NEPA process, the company has described relations with the Corps

---

to be good, but is finding the U. S. Fish and Wildlife Service to be more difficult.

**Concerns:**

At this point, the company's principle concern is more directed toward the Endangered Species Act than toward NEPA. It is specifically concerned with the open-ended authority of the agency to seek extensive biological survey data and specify unreasonable mitigation measures.

With regard to NEPA, the company understands that it is taking a calculated risk by seeking a finding of no significant impact, but it feels the risk is worth taking since the time requirements for an EIS can be so great. It would like to have more options for NEPA compliance without having to face the lengthy time frames.

---

to be good, but is finding the U. S. Fish and Wildlife Service to be more difficult.

**Concerns:**

At this point, the company's principle concern is more directed toward the Endangered Species Act than toward NEPA. It is specifically concerned with the open-ended authority of the agency to seek extensive biological survey data and specify unreasonable mitigation measures.

With regard to NEPA, the company understands that it is taking a calculated risk by seeking a finding of no significant impact, but it feels the risk is worth taking since the time requirements for an EIS can be so great. It would like to have more options for NEPA compliance without having to face the lengthy time frames.

---



Unlike the scoping process, which had proceeded in a fairly cooperative fashion, public participation in consideration of the draft EIS was adversarial. Six of the 17 months required to complete the EIS fell after issuance of the draft and prior to issuance of the final report. At the end of the process, the company's preferred option was adopted with three modifications and the imposition of numerous mitigation measures not originally proposed by the company.

**Concerns:**

Although the company was able to keep the NEPA process within acceptable time frames, it feels it was only able to do so by agreeing to excessive and expensive mitigation demands.

Although the company believes that the MOU among the federal land managers and the county helped coordinate and facilitate the NEPA process, it nevertheless feels that additional coordination and facilitation are necessary. Some method of resolving disputes among all of the interested agencies is required. As things stand, a single agency can impose major disruptions on time-critical projects by simply refusing to modify an unreasonable position. The company believes that imposition of enforceable time limits on the agencies might level the playing field.

Early in the project, the governmental agencies, in an apparent effort to avoid creating a public perception of undue project proponent influence, tried to limit direct contact between the company and the third party EIS contractor. This created a number of inefficiencies that caused the agencies to eventually rethink their position. Thereafter the process worked more smoothly from the company's perspective.

---

**GOLD - 2****Project:**

Expansion of an existing open pit gold mine. This expansion consisted of adding four new pits to an existing operation. Ore would be processed at the existing mill which would be reached by an 11 mile haul road. The new disturbance would affect 800 acres.

**Land Tenure:**

Land was controlled by mining claims.

**NEPA Trigger:**

NEPA was triggered by the company's submittal of a plan of operations for the expansion to the appropriate federal land managing agency.

**Scoping Process:**

The scoping process went routinely. Public scoping meetings were held near the site and at the nearest large city. The leading concern raised in public scoping meetings was the visibility of the new pit areas from a nearby wilderness study area. Following the public meetings, the federal land managing agency announced its intent to prepare an environmental assessment.

**EIS Preparation:**

Technically, an EIS was not prepared since the agency opted to prepare an environmental assessment which eventually led to a finding of no significant impact.

The environmental assessment took 19 months to complete. The time would have been shorter; however, the agency felt the third party contractor's work evidenced a pro-mining bias and much of the document was rewritten in-house. The extra work caused NEPA compliance to be 20 percent over budget.

Despite concerns over bias in the draft environmental assessment, the technical quality of the work was considered by both the company and the agency to be good.

BLM determined that a cumulative impacts analysis would be required; however this was handled in a separate document which was summarized in the project environmental assessment. Apparently the cumulative impacts review did not lead to additional delays. AU-2

Page 2

**Concerns:**

The company felt that the land managing agency was overly sensitive to the comments of one environmental activist and believes that holding public meetings in a large city away from the project site merely facilitated the efforts of citizen critics.

---

The company also felt that local officials of the federal agency were overly resistant to input from the agency's state office where more mining project expertise resided.

---

**GOLD -3****Project:**

Open pit, heap leach gold mine. The mine will have a ten year life. The rate of production is 35,000 to 40,000 tons per day. Total material to be handled is 120,000 tons per day. Tailings generated from a small ball mill for high grade ore will be sent to the heaps for leaching. There will be no conventional tailing storage. Total surface disturbance will be 2,700 acres.

**Land Tenure:**

All of the land to be disturbed is controlled by unpatented mining claims on land administered by a public land management agency of the federal government.

**NEPA Trigger:**

Plan of operations. The company and the federal agency agreed that environmental impacts will be sufficient to require an environmental impact statement.

**Scoping Process:**

The scoping process went well. All of the alternatives generated by the scoping process were anticipated.

**EIS Preparation:**

The EIS is being prepared by a third party contractor and the process is estimated to be about one-third complete. The projected Record of Decision date is February 1998. If the schedule holds, total elapsed time from the award of the contract to the Record of Decision will be 15 months. The initial cost estimate for the third party contractor is \$250,000.

To date the contractor has worked well with the company. The contractor's work is believed to be technically sound and the contractor has been cooperative in utilizing company generated data.

**Concerns:**

Since the initial scoping, the lead agency has developed an additional option for mitigating impacts to wildlife habitat, generating a need for additional baseline data which can be obtained without imposing delays. Of greater concern is the agency's request for additional geochemical testing of the ore since developing this information could impose a delay of six months. It is feared that additional data requests will be forthcoming. AU-3

Page 2

Despite the Memorandum of Understanding between the federal land management agency and the state environmental protection department, the two agencies do not appear to be very cooperative with one another. There have been instances where identical information has been required in different formats.

---

**GOLD -4****Project:**

Expansion of an open pit and underground gold mine, feeding common leach areas and two 18,000 ton per day mills. There are six autoclaves to treat refractory ore and two tailing disposal areas. Ancillary to the operations is a dewatering operation capable of pumping 70,000 gallons per minute. The total surface disturbance is 6758 acres.

**Land Tenure:**

With the exception of one railroad section which was purchased, the mineralized land is controlled through mining claims. After the EIS process was commenced, lode claims controlling the orebody were patented. Non-mineral land is controlled through patented mill site claims in addition to land acquired through a land exchange for tailing and waste rock. A second exchange is pending.

**NEPA Trigger:**

Until 1989, the mine operated pursuant to a series of Environmental Assessments. However, when pit expansion was proposed in 1989, the company did not resist federal land management agency suggestions that the new Plan of Operations would require a full Environmental Impact Statement. The pit expansion EIS was completed in 1991.

By 1994, the mine was pumping more water than the 1991 Final EIS projected and the agency determined that a supplemental EIS would be required. While that process was underway, patents were issued, possibly eliminating the EIS requirement. That notwithstanding, the company elected to continue with the Supplemental EIS since it still required a 4000 foot pipeline right of way across federal surface.

**Scoping Process:**

The company reports no major dissatisfaction with the scoping process. Reasonable alternatives were developed in connection with both the 1991 EIS and the Supplemental EIS which is still in progress. Interesting, however, is the growth in the number of individuals receiving specific notice of scoping meetings. Notice on the 1991 EIS went to 100 individuals in addition to various newspapers and Federal Register publication. By the time scoping started on the 1994 Supplemental EIS, notice went to more than 400 individuals.

**EIS Preparation:**

The 1991 EIS was prepared by a third party contractor and the Supplemental EIS is being prepared by a third party contractor. The 1991 EIS was completed in 25 months, and since it was the first agency mining EIS in the state, the company considers the time to have been fairly reasonable. The Supplemental EIS is proceeding at a slower rate due to an apparent lack of agency resources ranging all the way from a lack of mineral development specialists and scientific specialists to a lack of typists.

Costs for the 1991 EIS were in excess of \$1 million. Costs for the Supplemental EIS were not estimated by the company.

---

**Concerns:**

The company does not believe slow progress on the Supplemental EIS is due to any particular rules or policies in place. Indeed, it feels that NEPA case law has developed to the point where the process has considerable certainty and that any seemingly beneficial change might be more than offset by reduced certainty. It does believe that the lack of agency resources and current political trends pose substantial problems which cannot be overcome by regulatory revisions.

---

**GOLD - 5****Project:**

The project consists of an additional pit in an area of considerable recent mining activity in Nevada. The new pit would feed an existing processing complex. Adequate tailing capacity already exists and no expansion is planned. Other than the pit, the only additional surface disturbance will be for additional waste rock dumps and 4 miles of haulage road. Slightly over 500 acres will be disturbed.

**Land Tenure:**

The mineralized area and the new waste dumps are controlled mostly by unpatented mining claims on public lands. A small amount of the mineralized area is on private in holdings in the public land holdings. The portion of the haul road on public land is controlled by claims.

**NEPA Trigger:**

NEPA was triggered by the company filing a plan of operations with the public land managing agency.

**Scoping Process:**

The company feels the scoping process went well. Public scoping meetings were held in three cities in Nevada.

Four issues were identified in the scoping process and they remained the issues of concern throughout the NEPA process. No significant revision was required.

**EIS Preparation:**

The EIS was prepared by a third party contractor. The contractor was generally receptive to company input and company generated data. Total cost for the EIS, including contractor charges, agency oversight and data collection was \$1.5 million.

In order to expedite the NEPA process, the company identified key data requirements and commenced necessary studies during the year prior to actually submitting its plan of operations. Originally, the public land manager agreed to a nine month schedule for completing the EIS in a MOU executed between the company and the agency. Although this schedule slipped, only sixteen months elapsed from submission of the plan of operations to issuance of the record of decision. AU-5

Page 2

"Agency skepticism" over the results of some hydrologic modeling led to additional studies and the need to further explain why the project's hydrologic impacts were more positive than the land manager's preconceptions would have suggested.

Notwithstanding the activities described above, the company feels both the agency and the contractor were cooperative and technically competent.

**Concerns:**

The scoping and draft document phases of the EIS preparation consumed most of the time involved in the NEPA process. This suggests that a more streamlined approach would be for the company to work with the agency toward the development of a draft document which generally meets agency concerns prior to involving the public.

A second, less radical suggestion is that cooperating agencies be required to "lay their cards on the table" early in the process. The process has been overly complicated by the involvement of the cooperating agencies and EPA overwhelming draft documents at the end of the comment period, or, in some cases, during an extension of the comment period. Since EPA resources are considerable, their comments can trigger major rewrites of draft documents as well as supplemental studies which impose significant delays and unanticipated additional costs for other agencies and the project proponent.

---



**GOLD - 6****Project:**

This project involves expanding the oldest continuously operating open pit gold mine in the state. The expansion includes four new pits, two of which will be below the water table. Pit dewatering will discharge about 100 gpm. In addition, new leach pads and twelve new waste dumps will be built. An existing mill and tailing disposal area will continue in operation. Total new disturbance is approximately 2000 acres.

**Land Tenure:**

The ground is controlled by a combination of patented ground (1300 acres, 1000 of which already are disturbed) and unpatented claims on federally managed surface (700 acres, 300 of which already are disturbed).

**NEPA Trigger:**

NEPA was triggered by a Plan of Operations. Earlier activities at the mine had been conducted under environmental assessments. The proposed expansion incorporated the entire project site and the issues covered under the previous EAs.

**Scoping Process:**

Public scoping meetings were held in a nearby city and in the state's second largest city. They were largely uneventful.

**EIS Preparation:**

EIS preparation has proceeded fairly well, except for front end delays. Although the Plan of Operations was submitted to the agency in August 1994, the scoping process wasn't initiated until April 1995. The delay was attributed to agency budgetary problems. Once initiated, preparation of the EIS encountered additional delays attributable to the need to monitor pit water quality. The company acknowledges that it could have moved more quickly to complete the required monitoring.

The company is developing the bulk of the technical data for the EIS. Cooperation with both the agency and the third party EIS contractor are considered to be excellent. The lead federal agency is said to be working diligently to assure that the draft EIS will be available by the end of 1997.

**Concerns:**

The company's only concern has been the delays noted above.

---

**GOLD - 7****Project:**

The project is an open pit gold mine. The pit is below the water table. Production is 800,000 ounces per year. Included in the project is a 10,000 ton per day mill. Ancillary facilities include roads, waste dumps, tailing impoundments and small leach pads (to handle about 10% of the material). Total disturbance is about 1200 acres.

**Land Tenure:**

The mineralized ground is controlled by unpatented mining claims and the non-mineral ground is controlled by unpatented mill site claims.

**NEPA Trigger:**

Plan of Operations.

**Scoping Process:**

The scoping process was largely uneventful though the company feels the process would have moved faster had it been more aggressive in framing alternatives. The federal land managing agency appeared to have not done a great deal of advance preparation for the scoping meetings.

**EIS Preparation:**

The EIS was prepared by a third party contractor. The selected firm was a large, full-service engineering and environmental contractor which often reassigned personnel, causing some of the delays experienced.

Because the project was the first in the state operating below the water table, the initial concerns developed through scoping related to dewatering. Due to unsatisfactory performance it became necessary to change hydrologic contractors. As the EIS evolved, however, the focus shifted to post-mining pit water quality. While this shift did not cause a reopening of the scoping process, it did result in substantial delays since additional modeling and studies were required.

The company estimates the cost of the EIS to be in excess of \$2 million. Forty-four months elapsed from submittal of the plan of operations to issuance of the record of decision.

Relations with the lead agency were fairly adversarial in the early phases of the project, but the company says they improved substantially as the EIS progressed. Much of the improvement is attributed to the more business-like approach taken by the agency following appointment of its current state director.

The final EIS and record of decision were favorable to the company; however, an appeal was filed by a citizen activist group in March 1996. No decision on the appeal is expected until 1998 due to the large case load in the reviewing authority. Nevertheless, the company decided to commence construction on the strength of the denial of the petitioner's motion to stay.

---

**Concerns:**

Most of the company's concerns relate to the delays it encountered at several steps during the project. It believes much of the early delay is due to its own failure to push the agency into action. Instead, it relied on the time frames contained in the memorandum of understanding negotiated with the agencies at the outset of the NEPA process. A second factor in the delays is the agency's lack of qualified personnel and financial resources to handle the large number of mine related EIS' in the state. To help remedy this problem, several companies have funded a clerical position to expedite the paper flow in the local land management agency office.

The company has suggested several additional steps which could help speed the NEPA process. These include: firm time limits for various phases of the process; limitations on scope revisions following completion of the scoping process; and the use of third party contractors to undertake peer review of the technical issues raised in the EIS.

---

**GOLD - 8****Project:**

The project is an open pit gold mine. The pit is above the water table. Initial plans call for gold to be recovered through a heap leach process. Should higher grades be encountered as exploration continues, the company will consider adding a mill. Ancillary facilities include haul roads, temporary housing, highway upgrades and waste rock dumps. The mine is in an existing town.

**Land Tenure:**

Except for a few patented mining claims, both the mineral and non-mineral ground is controlled by unpatented mining claims on federally managed surface.

**NEPA Trigger:**

NEPA was triggered by the filing of a plan of operations.

**Scoping Process:**

The company believes that the scoping process went well. It attributes this and the short time frame for completing the EIS to its having undertaken baseline studies prior to seeking approval for its plan of operations. Only a small number of alternatives were developed. About 20 comments were received during the scoping process and none of them were controversial. Aside from some lead agency concerns on wildlife, the company feels it anticipated all of the issues raised.

Prior to the formal scoping process, the company also assembled a group of interested local citizens, including local officials and nearby ranchers. This informal public participation group provided advice to the company as it developed its plans and prepared its plan of operations.

Although the scoping document generally held, additional alternatives were included to accommodate public comments on siting the waste dumps.

**EIS Preparation:**

The EIS was prepared by a third party contractor. The contractor selected by the land managing agency was a large national firm which had been selected by the company to prepare its state air quality permits.

Cost of the EIS was approximately \$500,000, though this amount does not include the eighteen to twenty four months of baseline work undertaken by the company prior to submittal of its plan of operations. Once a plan of operations was submitted, it took eighteen months to reach a record of decision.

The company found the agency to be cooperative and believes the current state director is playing an important role in developing the agency's professionalism.

---

**Concerns:**

Despite the relatively fast pace at which the EIS was completed, the agency initially committed to a nine month schedule.

The company does not believe there are any institutional problems with the NEPA process. Instead it feels success is largely dependent upon the people assigned to the process and their willingness and ability to work positively and objectively.

---

**GOLD - 9****Project:**

This project is an open pit gold mine. Ore is sent to an existing mill which had been constructed for an earlier operation. Existing tailing disposal facilities are adequate. In addition to the pit, the company will construct waste dumps and new heap leach pads. The new operation will disturb an additional 1200 acres.

**Land Tenure:**

Both the deposit and the nonmineral land are on a mixture of patented claims, unpatented claims and railroad sections.

**NEPA Trigger:**

NEPA was triggered by a plan of operations.

**Scoping Process:**

The company describes the scoping process as having been straight forward. Public participation was minimal. Prior to scoping, the company identified what it believed to be the critical issues and these were the issues that dominated the final scoping document. Although the company was required to do a number of additional studies to satisfy the third party contractor and the federal land manager the scope remained unchanged in all significant respects. A manageable number of reasonable alternatives were specified.

**EIS Preparation:**

The EIS was prepared by a third party contractor. According to the company, the technical work, with one exception, has been of high quality. Preparation time was three and one half years from submittal of the plan of operations; however, the first sixteen months were devoted to the agency's acceptance of the plan of operations as being adequate enough to start the process. The company did take advantage of the sixteen month delay by undertaking baseline studies.

Originally, NEPA compliance costs were estimated to be approximately \$1 million. As the process proceeded, however, cooperating agencies and the third party EIS contractor insisted on additional studies, including groundwater and other hydrologic modeling, causing costs to rise to \$6 million.

The company describes the lead agency as being cooperative and willing, but lacking in adequate resources.

**Concerns:**

One of the drawbacks of using a third party contractor to prepare an EIS is that it leaves the agency unable to defend its documents. In the case of this project, most of the defense of the EIS was deferred to the contractor at the company's expense.

---

Lead agencies lack either adequate tools or the will to manage the role and participation of the cooperating agencies leading to unnecessary additional studies.

The company believes that agency personnel are inadequately trained to manage a NEPA project and suggests ongoing workshops, with industry participation, to remedy this problem.

EPA's final review practices should be modified.

---

**GOLD - 10****Project:**

The project is a new open pit gold mine. It includes a mill and tailing disposal area as well as waste dumps. No leaching operations are proposed. The project is not in an environmentally sensitive area. There are no threatened or endangered species, no high quality wetlands and no nearby wilderness areas. The pit acid forming potential is very low. Total disturbance is about 800 acres.

**Land Tenure:**

The land position is more complex than found for most projects in the survey. Fifty-nine% of the ground is controlled by unpatented mining claims on one U. S. land management agency's surface; 24% is controlled by unpatented mining claims on the other land management agency's surface; 15% is on patented claims; and 2% is on state owned land.

**NEPA Trigger:**

Federal NEPA requirements were triggered by the submittal of a plan of operations to the federal land management agencies. The state program comparable to NEPA was triggered by an application to the appropriate department of state government. As a result, one federal agency and the state agency became co-lead agencies. The other federal agency became a cooperating agency.

**Scoping Process:**

The scoping process was rather extensive. In addition to the three or four meetings held in the general project area, a public meeting was held in British Columbia since one of the drainages from the site flows into the province.

In a somewhat odd twist, the scoping process for this project never really ended. The co-lead agencies continued to take public comments on the scope throughout the EIS preparation phase. While this never resulted in a formal restructuring of the scope, it did raise issues which triggered major new studies and served to delay completion of the EIS.

**EIS Preparation:**

To call the EIS preparation tortuous would be an understatement. Four and one half years elapsed from the onset of scoping to issuance of the record of decision which is now under appeal. Originally, the federal lead agency committed to completing the EIS in one year; however, the schedule often slipped several months at a time, until the third year, when the AU-10 agency acknowledged it needed another full year to complete a draft document. Under agency rules, stays are automatic, so for that reason and the additional reason that there are remaining state permits to obtain, the project still is not under construction.

An environmental consulting firm primarily known for its work for the mining industry rather than as a government contractor was selected to prepare the EIS. It was awarded the work on a sole source basis because it had previously done the environmental assessment for an earlier phase of the project for the

---



company. By the end of its work on the EIS, the contractor's relationship with the co-lead agencies had deteriorated to the point where it qualified its responsibility for the final document.

During the contractor's work on the EIS, the company was discouraged from dealing directly with the firm. Officially, the company was instructed to deal directly with the contractor only on matters relating to the scope of the project and the budget. The co-lead agencies largely ignored technical information developed by both the company and the contractor, even though the company says, with the exception of wildlife, the contractor's technical work was of very high quality.

Public participation was massive at all stages of the EIS process. Much of the participation was encouraged by the agencies which distributed draft documents to a mailing list of several hundred and always included a self-addressed stamped return envelope. In addition, agency participation was unusually large. The company indicates that meetings scheduled to make decisions often had as many as 40 agency participants, many of whom came with a pre-selected agenda, the result of which was to add many additional studies to those developed through the scoping process. Of the agencies, EPA was the worst, usually commenting late and exhibiting a shallow understanding of the project.

The studies, whether undertaken by the company, the contractor or the agencies, normally produced data supportive of the project; however, the agencies treated positive studies with suspicion and often requested additional or supplemental studies.

Further complicating matters and adding to the delay was the lead agency's failure to replace the responsible local manager following a transfer. Instead, a series of several acting managers were appointed, none of whom served for more than one year.

When a draft EIS finally was published, advance copies were sent to opposition environmental groups, but not to the company. While this snub may be more symbolic than substantive, it well reflects the relationship between the company and the co-lead agencies.

The Final EIS consists of four volumes plus a summary document. Costs to the company have exceeded \$14 million, much of which was spent on studies.

**Concerns:**

Despite the myriad of problems it experienced, the company does not believe the NEPA process is fatally flawed. It believes most of its difficulties can be attributed to the lead agency local office's lack of experience on mining projects and its refusal to accept company offers to fund the relocation of qualified agency personnel from other offices.

The company believes there needs to be a more open relationship between project applicants, the agencies and the agencies' contractors, and notes that has been its experience on other projects. It also believes EPA's role in the NEPA process needs to be more constructive than was the case on this project. Finally, it believes agencies ought to face enforceable decision deadlines.

---

**GOLD - 11****Project:**

The project is construction of a third pit eight miles away from two existing open pit gold mines. No ancillary facilities are involved since existing mill and tailing storage are adequate to accommodate ore from the new pit. Total new surface disturbance is only seven acres.

**Land Tenure:**

The deposit is controlled with mining claims. The surface is privately held, presumably through Stockraising Homestead Act patents.

**NEPA Trigger:**

NEPA was triggered by the filing of a plan of operations with the federal surface manager. The existing operations had been the subject of two earlier environmental impact statements prepared by another federal land managing agency. . The exploration at the new pit site, which had triggered some citizen opposition, was conducted under an environmental assessment prepared by the lead agency.

**Scoping Process:**

The company believes that the scoping process did not go badly from the standpoint of issues raised and alternatives developed. The lead agency decided to tier a supplemental EIS on top of the two documents which previously had been prepared by the other federal land managing agency. The company supported this approach in the belief that it would result in quicker NEPA compliance.

**EIS Preparation:**

The EIS was prepared by a third party contractor whose work quality ranged from good to excellent. The company, however, is critical of the lead agency's contribution to the technical work. Initially, costs for the EIS were estimated to be \$1 million, but additional studies required by the agency have raised the total to \$3 million.

The company submitted its plan of operations to the agency in 1991. The first record of decision was issued in November, 1994. Unfortunately, the result of the agency's decision, based on its requirement that there be no unnecessary or undue degradation, would have been to cut-off a substantial amount of gold reserves. The company responded by initiating additional hydrologic and geochemical studies in an effort to demonstrate that the potential for acid rock drainage would not create unnecessary or undue degradation. AU-11

As a result of the new studies, a new record of decision, acceptable to the company was issued in September 1995, and the plan of operations was finally approved in May 1996. All that notwithstanding, the company reports that the agency is continuing to press for yet additional acid rock drainage studies.

---

**Concerns:**

The company believes the lead agency's insistence on additional studies may reflect an obstructionist attitude on the part of some personnel opposed to mining; however, it feels that this situation could be improved if the agency would establish standard protocols for geochemistry by rock type. Additionally, less emphasis should be placed on expensive, unreliable modeling and more emphasis should be placed on monitoring and mitigation. The company believes land manager discretion should be replaced with regulatory standards which, once met, would allow a project to progress without additional study requirements.

---

**URANIUM - 1****Project:**

Closure of a uranium mine and mill.

**Land Tenure:**

All lands involved are owned in fee.

**NEPA Trigger:**

Initially, the Nuclear Regulatory Commission (NRC) prepared an environmental assessment and issued a finding of no significant impact in connection with the company's application for an amendment to its NRC License. Fifteen years later, following an agency reorganization which eliminated the responsible NRC office, a change in the form of the local county government from three commissioners to a seven member council and increased public controversy over closing the tailing site in place, the FONSI was reversed and a decision was made to prepare an environmental impact statement.

**Scoping Process:**

The scoping process was non-controversial and developed the three alternatives considered in the original environmental assessment (closure in place; removal; and no action).

The initial scope has generally held; however, one modification was necessary to study the impacts associated with obtaining the off-site borrow material necessary to implement the closure in place option.

**EIS Preparation:**

All NRC environmental impact statements are prepared by Oak Ridge National Laboratories (ORNL) under a standing contract. The company was not permitted direct contact with ORNL and could only deal with the NRC project manager. This led to numerous inefficiencies and a failure to take advantage of information developed by the company. In the most egregious instance, ORNL misidentified a water source. The company describes the quality of the technical work as generally being mediocre.

Costs were high. In addition to the \$700,000 paid to ORNL, the company paid oversight costs to NRC in the amount of \$124 per hour and was required to engage its own independent consultants to address various questions that have arisen.

At the outset of the process, NRC identified the environmental impact statement for fast track consideration. That should have resulted in a 12 to 15 month project; however, the company now estimates that up to three and one half years will have elapsed before the record of decision finally issues.

**Concerns:**

Despite remaining cooperative, the agency has been beset with staff turnover problems and there have been ensuing delays in completing the EIS. The company feels the agency has taken frivolous public

---

comments too seriously, resulting in delays and additional costs. Of particular concern has been the differential treatment accorded one of the cooperating agencies, which has been antagonistic toward the company's preferred option and has regularly worked to slow down the process. Uncertainties over the eventual outcome of the EIS have caused some of the company's potential business associates to back away from transactions.

---

**JAMES E. LOESEL, SECRETARY  
CITIZENS TASK FORCE ON NATIONAL FOREST MANAGEMENT**

Thank you Mr. Chairman and members of the Subcommittee for this opportunity to present my views about the National Environmental Policy Act (NEPA).

My name is James Loesel. I am the Secretary of the Citizens Task Force on National Forest Management, a conservation group founded 16 years ago to provide NEPA responses to the Forest Service on plans for the George Washington and Jefferson National Forest and the projects which implement those plans. Over that period I have reviewed and responded to approximately 1000 scoping letters from the Forest Service on behalf of the CTF.

The Citizens Task Force is a founding member of the Southern Appalachian Forest Coalition. SAFC is active in the revision of the Land and Resource Management Plans for national forests in the Southern Appalachian region and has responded to scoping opportunities announced in the Federal Register. I am a consultant to the Southern Appalachian Forest Coalition on forest plan revision.

Although my views of NEPA are based in part on my formal academic training as a political scientist and as a landscape architect, they are more often the result of participating in the NEPA process for nearly 20 years.

**NEPA has been an important means for the public to contribute to resource management of the national forests.**

The positive aspects of NEPA include:

**A. Bringing the public into contact with the agency**

Through NEPA many members of the public who may be affected by a project are contacted by the Forest Service and notified of the proposed action. This is especially important for neighbors who adjoin national forest lands on which the project is proposed. The Forest Service regularly publishes notices of proposed projects in the newspaper and invites comments from the public.

Moreover, the Forest Service establishes lists of people who wish to receive notices of proposed actions. The Forest Service regularly informs people with whom the Forest Service has contacts, such as at open houses or annual meetings, that they may be added to these mailing lists. The Forest Service maintains multiple lists so that people can be put on lists to receive only that type of information in which they are interested. These lists are updated periodically and people who do not want to remain receiving information are dropped to reduce mailing costs.

Without NEPA it is unlikely the agencies would contact the public to solicit responses to proposed actions.

**B. Providing information about what the agency is doing**

The Forest Service sends scoping notices to the interested and affected members of the public about proposed actions or projects. This NEPA notification is the primary means by which the public learns of the actions or projects proposed by the agency.

A decade ago, the Forest Service only suggested that some form of management activity was being considered in a compartment, which is a unit used by the Forest Service for grouping timber stands. These units are numbered, and without a general map of compartmental boundaries, there is no reference of understanding by the general public. In general, it was difficult for members of the public to know what projects the Forest Service was considering or even if there was an active proposal being formulated.

Over the last ten years the information provided has focused more on the nature of the proposed action and the rationale for carrying it out. This provides the public with a greater amount of information on which to base comments. The amount of background information has also been increased in many of these scoping notices, which also helps members of the public to provide meaningful comments.

**C. Bringing up issues which would be missed otherwise**

NEPA is the primary mode through which the Forest Service provides information to the public about proposed actions and the response by the public is the primary way through which the Forest Service learns of public concerns

According to studies conducted as part of the Chattooga River project, which studied portions of Chattooga watershed in North Carolina, South Carolina, and Georgia, issues raised by the public significantly supplement and broaden the issues identified by the agency. In many cases in larger projects, the agency is so confident of the depth and breadth of public delineation on issues that it minimizes internal scoping. The identification of public issues is a significant element in the early part of the NEPA process, and it has a significant effect on how the environmental analysis is conducted at later stages.

The public not only plays an important role in defining the issues to be examined in the environmental analysis, but the public response gives the agency important information about the public feelings or reaction to the proposed action. This feed-back often allows the agency to craft the proposed action in a way that either meets public expectations or avoids public dissatisfaction. Thus, NEPA performs a function much broader than narrowly identifying possible environmental effects of proposed actions.

**D. Improving the quality of environmental analysis**

The issues identified by the public often focus the agency's attention on aspects that had not been thought of initially in a project. It is also the cumulative effects of the comments from the public that often cause the Forest Service to routinely increase the breadth of the environmental analysis on similar projects.

The Forest Service also will provide a review copy of the NEPA analysis when it has been drafted. The public not only has opportunity to comment on a draft Environmental Impact Statements (EIS), but also to review the drafted Environmental Assessments (EA). These reviews provide a valuable opportunity for the Forest Service to hear from the public about the adequacy of the environmental analysis. Again, it is not only the comments on a particular project that is important, but also the cumulative comments about the quality of the environmental analysis that has an effect on the agency. In my experience, they listen to reasoned, constructive comments over a period of time.

**E. Improving the quality of decisions**

I firmly believe that better information and analysis leads to better decisions.

The extensive NEPA involvement by the public in identifying issues has resulted in far more interdisciplinary discussion within the Forest Service than would have occurred otherwise. The result has been projects which reflect a greater multiple-use dimension than would occur without interdisciplinary discussion.

**There is room for improvement.**

The attention to the NEPA process sometimes has the unintended effect of focusing on smaller and smaller individual projects. This facilitates NEPA analysis, but it diverts attention from the overall watershed or landscape and the interrelationship of various projects.

The Jefferson National Forest used a form of area planning called Opportunity Area Analysis in the late 1980s and early 1990s. In Opportunity Area Analysis, there was an attempt to interrelate all the projects that were seen necessary to achieve a desired future condition (DFC) over a decade or the life of the Land and Resource Management Plan.



This was a NEPA document in which decisions were made, not just abstract planning analysis. From the standpoint of the District and Forest personnel conducting the analysis, there was a "payoff" in approved projects at the end of the analysis. From the standpoint of the public, we could focus our energies on a single concrete process in which the relevant factors were considered at one time.

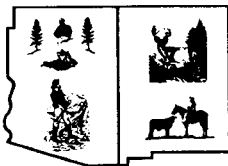
This process had widespread acceptance from the Forest Service and most segments of the public. It worked well for approximately six years, until it was challenged by a segment of the logging community and thrown out by the Regional Office.

Since then the number of scoping notices has shot up at a nearly exponential rate. Each project is formulated as a discrete action, without relationship to the other projects which have been carried out in the past or those which may be formulated in the future. At times it is possible to get a cumulative effects analysis of projects of a similar kind, such as timber harvesting, but there is little interconnections of different kinds of projects. For achieving a desired future condition for an area, it is precisely this interconnection of projects that is important to view.

From the standpoint of the public, the number of discrete projects is overwhelming and it is hard to see a big picture from all the little pieces. This is frustrating and tends to reduce the quality of the public comment.

The current use of Categorical Exclusions (CE) exacerbates this trend. The number of NEPA projects increases, but the significance of most of these as individual projects is hard to grasp. However, the current use of Categorical Exclusions also allows for some significant actions to receive a cursory analysis. We believe there should be a reexamination of these categories. We also believe there should be a revisiting of the interpretation of "special circumstances"; under current interpretations there do not appear to be any special circumstances that would trigger an EA instead of a CE.

I would be happy to answer any questions which the Committee has or to provide additional information which may be of help in your review of this important law.



Coalition Of Arizona/  
New Mexico Counties  
For Stable Economic  
Growth

*"Working together for responsible  
management."*

March 18, 1998

**WRITTEN STATEMENT OF HOWARD HUTCHINSON, EXECUTIVE DIRECTOR  
FOR THE COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES**

**STATE, TRIBAL AND LOCAL GOVERNMENT INVOLVEMENT IN  
FEDERAL LAND PLANNING AND THE NEPA PROCESS**

**EXECUTIVE SUMMARY**

The adoption of the National Environmental Policy Act (NEPA) in 1969, created the role of State, Tribal and local governments in the federal decision making process. The federal land management laws enacted in 1976 (FLPMA & NFMA) also contained specific requirements for participation by non-federal governing bodies. It took several decades and numerous court decisions to get the NEPA, FLPMA and NFMA implemented. While federal agencies were engaged in this process, non-federal governments paid little attention. Social, cultural and economic impacts were absent in the defining litigation.

It wasn't until the late 1980's that State and local governments, particularly county governments, began to feel the fiscal impacts of reductions of revenue from economic activities on federal lands. The impacts were not slow and incremental. Local governments saw 50 to 60 percent losses in single years. As the revenues declined and unemployment and the demand for social services increased, County officials faced angry constituents demanding action.

Research into the federal statutes and regulations disclosed the requirements for inclusion of non-federal governments in the environmental planning process. Years of no active participation, followed by keen interest, caught federal agencies by surprise. Just when the process seemed clear, federal employees were hearing from a statutorily and regulatory defined interest. Changes are always turbulent, and finding chairs and larger tables for the now eager participants has been no exception. If the past history of regulatory direction is an indication, the role of non-federal governments will be defined over a period of years through mutual agreement and judicial interpretation.

The federal land management agencies are obligated to enter into coordinated land planning and decision making with State, Tribal and local governments in three distinct federal acts: The Federal Land Policy and Management Act (FLPMA) governs the development of Bureau of Land Management (BLM) resource management plans or management framework plans; The National Forest Management Act (NFMA) governs the development of National Forest Management Plans, and; The National Environmental Policy Act (NEPA) governs the process of determining the significance of impacts on the environment by federal actions.

Under the NEPA, State, Tribal and local governments may request recognition or be requested by the land management agencies to be joint lead or cooperating agencies in actions affecting the environment within the State, Tribal lands or local government jurisdictions. The decision to request or allow a State, Tribal and local government to be a joint lead or cooperating agency belongs to the line officer in charge. If a State, Tribal and local government disagrees with the decision, it can appeal through the Forest Service or BLM administrative process and/or directly to the Council on Environmental Quality (CEQ).<sup>1</sup>

1. 40 CFR 1501.5

---

**Coalition Of Counties**


---

Federal agencies cannot, nor should they, shoulder full responsibility for the lack of State, Tribal or local government participation in the land planning and decision making process. These governments had an opportunity under the laws and regulations to participate. However, the federal agencies had an obligation to solicit that participation which still does not occur with the frequency required by statute and regulation.

While not dealt with in detail in the oral or written testimony, the Endangered Species Act (ESA) has NEPA implications as well. The ESA requires federal agencies to conference or consult with the U.S. Fish and Wildlife Service (FWS) when conducting any action that may have an adverse effect on a listed species. The NEPA regulations require that listed species and their habitats be considered in the decision making process.

The ESA also has specific requirements for the FWS to notify and request the input of State, Tribal and local governments for listing, declaration of critical habitat and recovery planning. In the 10th Circuit Court of Appeals the FWS must prepare a NEPA document when declaring critical habitat. The 9th Circuit has a contrary opinion.

There is currently litigation pending in which the plaintiff's relief is requirement of the FWS to prepare a NEPA document when listing a species. In another case, the plaintiff's relief requests a NEPA document be prepared for development of recovery plans. Both of these cases are in the 10th Circuit.

Mere input by State, Tribal and local governments that has little influence on federal agency decisions was not the obvious intent of Congress in the planning and decision making acts. In order for the process to function properly, federal agencies must treat these sovereign divisions of government with the respect accorded to them under the Constitution.

Under the current functioning of the federal agencies, the people of the various states, especially the western states, have two or more defacto, executive, legislative and judicial branches of government within their states that are not subject to political accountability. This is a source of great resentment and is contrary to the basic principles of government guaranteed by the Constitution.

The NEPA can be an effective decision making process that bridges the gap between federal, State, Tribal and local government jurisdictions. However, Congress needs to take a serious look at transferring most, if not all, lands held within the States to those respective States.

The act of transferring the lands is not without problems and cannot be accomplished in a short period of time. Until such a transfer is accomplished, Congress should act to ensure that the federal agencies consult, cooperate, and coordinate in their planning and decision making processes with State, Tribal and local governments.

Clearly, Congress has an obligation to bring clarity to the federal agency decision making process especially in federal lands planning and environmental and species protection. Federal agency personnel are in gridlock. Not only do they have to consider the effects of their decisions on the State, Tribal and local governments, they must also consider the Clean Water Act, the Clean Air Act, the Wild and Scenic Rivers Act, Wilderness Act, a host of other acts, executive orders, along with compact, trade and treaty obligations. No federal agency can make a decision that follows all of the procedural requirements contained in all the above legal instruments all of the time.

---

*NOTE: The following descriptions of coordinated planning and decision making are focused on the local government roles in the processes.*

**Federal Land Policy and Management Act Process**

Page 2 of 10

---

**Coalition Of Counties**


---

It is significant to note that FLPMA provides explicit directives for the BLM to coordinate public land use planning with State, tribal and local governments, and to ensure that federal land use plans are consistent with local plans to the maximum extent possible. The statute details the BLM's mandate as follows:

(c) In the development and revision of land use plans the Secretary shall...

(9) to the extent consistent with the laws governing the administration of the public lands, **coordinate** the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the **State and local governments** within which the lands are located, including, but not limited to, the Statewide outdoor recreation plans developed under the Act of September 3, 1964 (78Stat.897), as amended, and of or for **Indian tribes** by, among other things, **considering the policies of approved State and Tribal land resource management programs**. In implementing this directive, the Secretary shall, to the extent he finds practical, **keep apprised of State, local, and Tribal land use plans; assure that consideration is given to those State, local, and Tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.**

(f) The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, **State, and local governments** and the public, adequate **notice and opportunity to comment upon and participate in the formulation of plans and programs** relating to the management of the public lands.<sup>2</sup> [Emphasis added]

FLPMA clearly lays out mandates for coordination with local government plans, resource related policies, and programs. The regulations issued by the BLM to implement FLPMA are very detailed and specific pertaining to the coordination with county governments and protection of custom, culture, and economic and community stability. BLM regulations use the terms "consistent" and "local government" which are defined:

(c) Consistent means that the Bureau of Land Management plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans, or in their absence, with policies and programs, subject to the qualifications in Section 1615.2 of this title.

(e) Local government means any political subdivision of the State and any general purpose unit of local government with resource planning, resource management zoning, or land use regulation authority.<sup>3</sup>

Relevant plans of the BLM, which are subject to coordination with county government and county land use plans, are called "resource management plans." However, amendments to older plans such as management framework plans are also subject to coordination requirements.<sup>4</sup> Approval of a resource management plan is considered a major federal action significantly affecting the quality of the human environment. Thus, the NEPA process also applies.<sup>5</sup>

---

2. 43 USC 1712(c)(9),(f)

3. 43 CFR 1601.0-5(c),(e)

4. 43 USC 1712(d); 43 CFR 1610.8(a)(3)(ii)

5. 43 CFR 1601.0-6

---

**Coalition Of Counties**


---

BLM regulations are specific in requiring **coordination<sup>6</sup>** and **consistency** between federal land use plans and local plans. If conflicts exist, or local plans do not exist, the regulations require BLM to make every reasonable effort to resolve the conflicts and be consistent with existing local policies and programs. In order to convey the spirit as well as the letter of the regulations, pertinent elements are quoted below:

**Section 1610.3-1 Coordination of planning efforts.**

(a) **In addition to the public involvement** prescribed by Section 1610.2 of this title the following **coordination** is to be accomplished **with** other Federal agencies, **State and local governments**, and **Indian tribes**. The objectives of the coordination are for the State Directors and District and Area Managers to keep apprised of non-Bureau of Land Management plans; assure that consideration is given to those plans that are germane in the development of resource management plans for public lands; **assist in resolving, to the extent practicable, inconsistencies between Federal and non-Federal government plans**; and provide for **meaningful** public involvement of other Federal agencies, **State and local government officials**, both elected and appointed, and **Indian tribes** in the development of resource management plans, **including early public notice of proposed decisions which may have a significant impact on non-Federal lands**.

(b) State Directors and District and Area Managers **shall** provide other Federal agencies, **State and local governments**, and **Indian tribes opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs**. To facilitate coordination with **State governments**, **State Directors should seek the policy advice of the Governor(s)** on the timing, scope and coordination of plan components; definition of planning areas; scheduling of public involvement activities, and the multiple use opportunities and constraints on public lands. **State Directors may seek written agreements with Governors or their designated representatives on processes and procedural topics** such as exchanging information, providing advice and participation, and time-frames for receiving **State government** participation and review in a timely fashion. If an agreement is not reached, **the State Director shall provide opportunity for Governor and State agency review, advice and suggestions on issues and topics that the State Director has reason to believe could affect or influence State government programs**.

(c) In developing guidance to District Managers, in compliance with section 1611 of this title, the State Director **shall**:

(1) Ensure that it is as consistent as possible with existing officially adopted and approved resource related plans, policies or programs of other Federal agencies, **State agencies, Indian tribes and local governments** that may be affected as prescribed by Section 1610.3-2 of this title;

(2) Identify areas where the proposed guidance is inconsistent with such policies, plans or programs and provide reasons why the inconsistencies exist and cannot be remedied; and

(3) **Notify** the other Federal agencies, **State agencies, Indian tribes or local governments** with whom consistency is not achieved and indicate any appropriate methods, procedures, actions and/or programs which the State Director believes may lead to resolution of such inconsistencies.

(d) A notice of intent to prepare, amend, or revise a resource management plan **shall** be submitted, consistent with **State procedures** for coordination of Federal activities, for circulation among **State agencies**. This notice **shall also be submitted** to Federal agencies, **the heads of county boards, other local government units and Tribal Chairmen or Alaska Native Leaders** that have requested such notices or **that the responsible line manager has reason to believe would be concerned with the plan or amendment**. These notices **shall** be issued simultaneously with the public notices required under Section 1610.2(b) of this title.

(e) Federal agencies, **State and local governments and Indian tribes shall** have the **time period** prescribed under Section 1610.2 of this title for **review and comment on resource management plan proposals**. **Should they notify the District or Area Manager**, in writing, of what they believe to be **specific inconsistencies** between the Bureau of Land Management resource management plan and their officially approved and adopted resources related plans, **the resource management plan documentation shall show how those inconsistencies were addressed and, if possi-**

<sup>6</sup> Coordinate is defined as "equal, of the same rank, order, degree or importance; not subordinate." Blacks Law Dictionary 303 (5th ed. 1979).

---

**Coalition Of Counties**


---

**ble, resolved.** [Emphasis added]

**Section 1610.3-2. Consistency requirements.**

- (a) Guidance and resource management plans and amendments to management framework plans **shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein**, of other Federal agencies, **State and local governments and Indian tribes**, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public land, including Federal and **State pollution control laws** as implemented by applicable Federal and **State air, water, noise, and other pollution standards or implementation plans**.
- (b) In the absence of officially approved or adopted resource-related plans of other Federal agencies, **State and local governments and Indian tribes**, guidance and resource management plans **shall, to the maximum extent practical, be consistent with** officially approved and adopted **resource related policies and programs** of other Federal agencies, **State and local governments and Indian tribes**. Such consistency will be accomplished so long as the guidance and resource management plans are consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands, including, but not limited to, Federal and **State air, water, noise and other pollution standards or implementation plans**.
- (c) State Directors and District and Area Managers **shall**, to the extent practicable, **keep apprised of State and local governmental and Indian Tribal policies, plans, and programs**, but they **shall** not be accountable for ensuring consistency if they have not been notified, in writing, by **State and local governments or Indian tribes** of an apparent inconsistency.
- (d) Where **State and local government policies, plans, and programs differ**, those of the **higher authority will normally be followed**.
- (e) Prior to the approval of a proposed resource management plan, or amendment to a management framework plan or resource management plan, the **State Director shall submit to the Governor of the State(s) involved, the proposed plan or amendment and shall identify any known inconsistencies with State or local plans, policies or programs**. The Governor(s) shall have 60 days in which to identify inconsistencies and provide recommendations in writing to the State Director. If the Governor(s) does not respond within the 60-day period, the plan or amendment shall be presumed to be consistent. If the written recommendation(s) of the Governor(s) recommend changes in the proposed plan or amendment which were not raised during the public participation process on that plan or amendment, the State Director **shall** provide the public with an opportunity to comment on the recommendation(s). If the State Director does not accept the recommendations of the Governor(s), the State Director **shall** notify the Governor(s) and the Governor(s) shall have 30 days in which to submit a written appeal to the Director of the Bureau of Land Management. The Director **shall** accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest. The Director **shall** communicate to the Governor(s) in writing and publish in the FEDERAL REGISTER the reasons for his/her determination to accept or reject such Governor's recommendations.<sup>7</sup> [Emphasis added]

County governments should keep in contact with the Governor of their state to assure the county needs are considered. However, if the BLM has been informed regarding county needs, involvement, and plans, the agency should coordinate directly with the county government. The regulations cited above prescribe early involvement of local government in BLM planning activities. This requirement is reinforced in the next section of the regulations:

At the outset of the planning process, the public, other Federal agencies, **State and local governments and Indian tribes shall** be given an opportunity to suggest concerns, needs, and resource use, development and protection opportunities for consideration in the preparation of the resource management plan.<sup>8</sup> [Emphasis added]

When the BLM begins the process to amend or develop a resource management plan, the agency is required to consider the ability of the resource area to respond to local needs when formulating reasonable

7. 43 CFR 1610.3-1(a),(b),(c),(d),(e); 1610.3-2(a),(b), (c),(d),(e).

8. 43 CFR 1610.4-1.

---

**Coalition Of Counties**


---

alternatives. The regulations state:

Factors to be considered may include, but are not limited to:

- (e) Specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, **State and local government agencies and Indian tribes;**
- (g) **Degree of local dependence** on resources from public lands.<sup>9</sup> [Emphasis added]

Clearly, the BLM must consider the impact of its actions on the economies and communities of the counties involved. Further, after alternatives have been developed, the BLM "...shall estimate and display the physical, biological, **economic, and social effects** of implementing each alternative considered in detail."<sup>10</sup> [Emphasis added] The completed draft resource management plan and associated environmental impact statement "...shall be provided for comment to the **Governor of the State** involved, and to officials of other Federal agencies, **State and local governments and Indian tribes** that the State Director has reason to believe would be concerned."<sup>11</sup>

Upon implementation, the plan shall be monitored to determine whether it needs to be amended.<sup>12</sup> [Emphasis added] State and local governments can be the most beneficial in this portion of the process. Having resident monitoring and reporting can free up agency personnel, approach "real time" reporting of data and reduce the costs of implementation.

Like the BLM, local governments are required to prepare annual budgets. Having an action brought forward after the county budget has been completed presents fiscal and staffing problems that are not easily overcome. The same holds true from the BLM side, i.e., the Area, District or State Office may not have properly projected their budget requirements to fund county cooperating agency tasks. From this standpoint alone, it seems logical that the respective responsible officials would have consultations prior to creation of their respective budgets.

This was the purpose of the Memorandum of Understanding (MOU) executed between Catron County, New Mexico and the Gila National Forest. This MOU not only sets out the procedures for completion of environmental documents under the NEPA and Forest Planning coordination with the county, but also sets up communication lines to keep each party informed in "real time." This avoids surprise actions for both the Forest Service and the county. This was done in recognition of the fact that most conflicts are the result of missed communication opportunities.

The Chief of the Forest Service claims that the Catron County MOU with the Gila National Forest evidences the level of cooperation that the Forest Service recognizes as the intent of federal legislation and Forest Service regulations.<sup>13</sup> The legislation that lays out the requirements for the Forest Planning process was passed by the same Congress that authored the FLPMA.

---

**National Environmental Policy Act Process**


---

40 CFR §1500 is the guiding regulation for implementation of the NEPA developed by the Council of Environmental Quality (CEQ). Each federal agency is required to develop implementing regulations based on the CEQ guidelines. What follows is a description of the regulations adopted by the Bureau of Land Management. The only significant difference between BLM and Forest Service guidelines is that the Forest Service Environmental Assessment procedure includes scoping. While each agency's regulations differ, the examples below are consistent with the CEQ regulations and will be found in each respective agency's

<sup>9</sup> 43 CFR 1610.4-4(e),(g).

<sup>10</sup> 43 CFR 1610.4-6.

<sup>11</sup> 43 CFR 1610.4-7

<sup>12</sup> 43 CFR 1610.4-7

<sup>13</sup> Declaration of Jack Ward Thomas, Chief of the Forest Service, submitted in the case, U.S. v. Nye County.

---

**Coalition Of Counties**


---

implementing guidelines.

40 CFR §1501.7 describes scoping. "There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to proposed action. . . . (a) As part of the scoping process the lead agency shall: (1) Invite the participation of affected Federal, **State, and local agencies**..... (2) Determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. (4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement."

Much activity occurs before an Environmental Impact Statement (EIS) is prepared. Integration of local governments into the process during scoping is not the earliest possible time a State or local government can become involved. Informal and formal communication of intentions prior to an action being identified for implementation can precede scoping by years. It is obvious by the above statutory and regulatory language that there should be a close and continuous working relationship between the BLM, State and local governments. As stated above, an MOU delineating the process responsibilities of each party would go a long way towards heading off disagreements and misunderstandings.

The National Environmental Policy Act Handbook (NEPAH) directs the BLM NEPA process. There are many reasons beyond heading off potential conflicts in coordinated resource management planning and the NEPA processes. For example:

A. **General.** Existing environmental analyses should be used in analyzing impacts associated with a proposed action to the extent possible and appropriate. This approach builds on work that has already been done, avoids redundancy, and provides a coherent and logical record of the analytical and decision making process.<sup>14</sup>

In order to avoid redundancies in analysis and reduce the bulk of a NEPA document, NEPAH suggests:

F. **Incorporation By Reference** (40 CFR 1502.21).

1. ....Special technical or professional studies and analyses prepared by the BLM, other Federal agencies, **State, local or Tribal governments**, or private interests may be incorporated by reference.<sup>15</sup> [Emphasis added]

State or local government's land plans, policies, laws and ordinances easily fall into this category. Many land plans are developed through professional or academic studies that will lend to fulfilling the intent of the above regulations. Without a high level of interaction with State and local governments, BLM personnel are likely to not even know of the existence of studies and documents that can save their offices considerable time and money when preparing environmental documents.

In addition to avoiding the costly and time-consuming situations stated above, one of the primary purposes for early involvement of State and local governments is avoiding major rewrites of draft NEPA documents that failed to consider potential significant impacts. It is at the level of preparation of an Environmental Assessment (EA) that an "interdisciplinary (I.D.) review of proposed actions"<sup>16</sup> can involve State and local governments to "determine if any impacts are significant."<sup>17</sup>

The amending of the Federal Advisory Committee Act in 1995 opens the door to State or local government elected officials or their designees to be I.D. team members. "The EA process need not be time-consuming nor complicated. The level of assessment should be commensurate with the anticipated impacts and the **degree of public concern**."<sup>18</sup> [Emphasis added] What better way to determine anticipated impacts on the local social or economic structures or identify the degree of public concerns than to have

<sup>14</sup> H-1790-1 NEPAH III-A.

<sup>15</sup> H-1790-1 NEPAH III-F.1.

<sup>16</sup> H-1790-1 NEPAH IV-A.2.

<sup>17</sup> H-1790-1 NEPAH IV-B.(2)

<sup>18</sup> H-1790-1 NEPAH IV-B.



---

**Coalition Of Counties**


---

locally elected representatives participate in the decision making process? The Handbook suggests this by saying:

**B. Environmental Assessment Procedures.**

2. ...Agencies with legal jurisdiction or special expertise, applicants, and the public should be involved, to the extent practical, in the preparation of the EA (40 CFR 1501.4(b)).<sup>19</sup>

In support of the suggestion for an MOU is the following:

**B. Environmental Impact Statement Procedures.**

1. c. (2) **Agencies with special expertise or interest** in the subject should be notified in order to alert them of potential consultation and coordination needs and to **invite them to be cooperating agencies**, if appropriate (see Paragraph B.1.g below). **Memoranda of understanding** or inter-agency agreements which provide for coordination and consultation **should be adhered to or developed**, where appropriate, to help guide such activities.<sup>20</sup> [Emphasis added]

1. g. **Identify Cooperating Agencies** (40 CFR 1501.5, 1501.6, 1508.5 and 1508.16; 516 DM 1.5). **The BLM, as lead agency, is responsible for establishing liaison with all Federal, State, local, and Tribal agencies that have jurisdiction by law or special expertise** with respect to any environmental impact involved in a proposed action **and for requesting their participation as a cooperating agency** on an EIS, as appropriate.<sup>21</sup> [Emphasis added]

The avoidance of redundancy and the reduction of the bulk of environmental documents is not the only reason for incorporation of local government concerns. It may also head off litigation of disagreements. In that context the Handbook contains the following requirement:

C. 3. e. (4) **Relationship to Non-BLM Policies, Plans, and Programs.** Explain how the proposed action relates to the **policies, plans, programs, controls and management practices** of other Federal, State and local agencies and private organizations. **Any land use planning or zoning statutes or requirements which may affect or limit the proposal should be discussed.**<sup>22</sup> [Emphasis added]

---

**National Forest Planning Process**


---

The NFMA was enacted by the same Congress that enacted the FLPMA. Hence, many of the same coordination and consistency requirements of the FLPMA are included. In the interest of brevity, the following is a summary of those requirements:

- Coordinate with equivalent and related **local government** planning.
- Give notice to **local government** simultaneous with publication of Notice of Intent.
- Review **local planning and land use policies** and display in the forest plan environmental impact statement.
- Consider objectives of **local governments**.
- Assess interrelated impacts of **local plans and policies**.
- Determine how plans will deal with impacts.
- Develop alternative to deal with conflicts.
- Have at least 3 meetings with **local officials**:
  - \* At the beginning to develop coordination procedures.
  - \* After issues have been identified.
- Prior to selecting preferred alternative:
  - \* Seek input on research needs.

---

<sup>19</sup> H-1790-1 NEPAH IV-B.2.

<sup>20</sup> H-1790-1 NEPAH V-B.1.c(2)

<sup>21</sup> H-1790-1 NEPAH V-B.1.g.

<sup>22</sup> H-1790-1 NEPAH V-C.3.e.(4)

---

**Coalition Of Counties**

\* During monitoring, consider the effects of national forest management on **local government jurisdictions**.

---



---

**The Role of Local Governments**

The role of local government is to provide a special expertise that federal agencies lack, which is "specific" knowledge—the knowledge of time, place and experience described by Nobel laureate F.A. Hayek in "The Use of Knowledge in Society." (Scarlett, 1996) Without that knowledge, decision makers can make irreversible and irretrievable impacts on the local environment. Absent specific knowledge, there cannot be a true understanding of environmental problems and possible remedies.

As in an ecosystem, the activities of a group of autonomous humans form what we observe as a social structure. Any defective or dysfunctional individual within that social system can cause devastating impacts on a community. When resource use decisions create unemployment and/or disrupt the economic fabric, domestic violence, juvenile crime, truancy and substance abuse have been observed to increase. If the disruptions are persistent, vital human skills and infrastructure necessary for land management activities are lost.

Indicators of a healthy community have been described as: risk taking tolerance that encourages innovation and experimentation; production at optimum potential; sustainable utilization of renewable natural resources; a high level of retention of custom and culture; recognition and protection of property rights; market forces responding to the needs of society, and; a high level of protection for the health, welfare and safety of the local populations.

Communities, like living organisms, have defense or immune systems. When foreign substances are introduced into a body, the response is involuntary. Communities react much the same way to new ideas or "newcomers." Local governments reflect the culture they represent in locally developed policies and plans. As seen in the above legislation and implementing regulations, there is recognition of these locally developed concepts.

Federal agencies and local governments are required to prepare annual budgets. Having an action brought forward after the county budget has been completed presents fiscal and staffing problems that are not easily overcome. The same holds true from the agency side, i.e., the BLM Area, District or State Office may not have properly projected their budget requirements to fund county cooperating agency tasks. From this standpoint alone, it seems logical that the respective responsible officials would have consultations prior to creation of their budgets.

President Clinton's administration has called for an increase of local government participation in the decision making process. The Memorandum of Understanding to Foster the Ecosystem Approach<sup>23</sup> states, "Consistent with their assigned missions, federal agencies should administer their programs in a manner that is sensitive to the needs and rights of landowners, local communities, and the public, and should work with them to achieve common goals."

There has not been a consistent application of this policy and there is a growing skepticism of this administration's commitment to these policies as evidenced in the reaction to the Grand Escalante Staircase National Monument, American Heritage Rivers Initiative, Border 21 and the proposed Forest Service Roadless area policy.

---

23. Memorandum of Understanding to Foster the Ecosystem Approach between the Council on Environmental Quality, Dept. of Agriculture, Dept. of the Army, Dept. of Commerce, Dept. of Defense, Dept. of Energy, Dept. of Housing and Urban Development, Dept. of the Interior, Dept. of Justice, Dept. of Labor, Dept. of State, Dept. of Transportation, Environmental Protection Agency, and Office of Science and Technology Policy, Signed December 16, 1996.

## CONCLUSION

Our modern age of communication and travel has created a high level of interest in the management of federal lands by urban residents (larger community of interest) who are removed in distance and lack "specific" knowledge. Many westerners perceive an imbalance of representation of this community of interest in Congress and in the agency planning process as relegating the western states to colonial status.

The advent of localized cooperative planning in the federal land management process has created a faint light at the end of the tunnel. However, the conflict between local interests and the larger community of interest has not been resolved. By increasing the role and presence of local governments in the decision making process, local interests and specific knowledge can be effectively incorporated. The role of the federal agencies, then, is to insure that the input of the larger community of interest is balanced with the local interests.

Very little, if any, customary land uses in the western rural areas were "planned" into existence by government. The use of the resources on the federal lands predates the creation of the U.S. Government. The first humans to settle these lands established what is now called indigenous rights. Santa Fe, New Mexico was a state capitol ten years before the Pilgrims landed at Plymouth Rock. Through the Treaty of Guadalupe-Hidalgo, citizens and Indians of the New Mexico Territory<sup>24</sup> were guaranteed protection of their practice of religion, property rights and access to and customary use of the public lands<sup>25</sup> in perpetuity. The institution of federal land planning is viewed by many western residents as another breach of treaty and fairness.

The transfer of the federal lands to the states has been offered as a solution to the conflict between the local and national interests. However, this solution may merely "localize" the conflict between the rural and urban interests within a state. So it appears that local government would still have a role in being a representative voice at the decision making table.

Local governments are beginning to exercise their roles in the decision making process. There is some jostling and elbowing at the table which must be expected. In some cases, disagreements will only be resolved by judicial ruling. The outcome of local participation will be to infuse the land use planning process with innovation and fairness. This, in turn, would lead to greater local participation in achieving the future conditions beneficial to the general welfare of the entire nation.

The 80's and 90's will be looked back on as the era of land use planning conflict. The conflict was the result of the sharp increase in civil litigation and government planning and regulatory enforcement at all levels. During this time, all levels of government and the courts have been redefining land use management. Out of this conflict has emerged new buzz words such as, takings, States rights, county movement, sagebrush rebellion, equitable estates (reactive) and cooperation, partnering, consensus and synergy<sup>25</sup> (pro-active). People who have been adversely and often arbitrarily impacted by these disruptions of their accustomed methods of survival are likely to adopt reactive strategies and be suspect of pro-active remedies.

## LITERATURE CITED

SCARLETT, Lynn 1996. Evolutionary Ecology, A new environmental vision. Reason, 28(1):21

HUTCHINSON, Howard. LOCAL GOVERNMENT INVOLVEMENT IN THE NEPA PROCESS, A paper presented at the Land Use Planning and Design Working Group Technical Session at the Society of American Foresters National Convention held in Albuquerque, New Mexico, November 9-13, 1996.

24. The territory extended west from the Rio Grande River to the Colorado River and from the Mexican border to central Colorado and west of there, to what is now the Nevada/California border.

25. synergy - 1. The interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects. 2. Cooperative interaction among groups, especially among the acquired subsidiaries or merged parts of a corporation, that creates an enhanced combined effect.

**Chronology of Port Newark/Elizabeth Dredging Permit**

- Meeting w/Corps on PN/PE February 15, 1990
- Sampling Plan meeting w/Corps March 9, 1990
- Sampling Plan obtained from Corps April 5, 1990
- PA submits Formal Application to Corps April 11, 1990
- Original Corps Permit expires May 6, 1990
- Meet w/NJDEPE to confirm Testing Protocol June 25, 1990
- Letter, Corps to ENSECO Lab, requesting QA data prior to initiation of 28 day test June 19, 1990
- First Bulk Sediment Test Results available for Corps (Reaches B & D) June 26, 1990
- PA submits Bulk Sediment Data to NJDEPE July 11, 1990
- PA inspects labs (S. Solomon) July 12, 1990
- Bulk Sediment Analyses formally submitted to Corps; PA requests go-ahead to start 28 day test July 3, 1990
- PA submits additional information (boring logs) which Corps requested as a result of the 7/3/90 submission July 23, 1990
- PA compiles data summary sheets of data supplied on 7/23/90, which Corps had requested August 17, 1990
- Corps provides PA with approved sampling schemes concurrence to start-up 28 day testing September 6, 1990
- PA requests EPA's concurrence w/Corps' 28 day sampling plan; PA meets w/ PA, gets verbal ok September 7, 1990
- EPA forwards written concurrence September 11, 1990
- Port/Eng. Dept, gives Materials Div. formal authorization to proceed w/28 day testing September 20, 1990
- PA submits concurrence (EPA/Corps) to NJDEPE September 20, 1990
- PA staff meet at ENSECO facility to discuss October 1, 1990

discrepancies in the report	
• PA notifies ENSECO to repeat 28 day test	November 21, 1990
• PA submits Bioassay data (except for 28 day tests) to the Corps	January 4, 1991
• Corps sends comments to PA regarding 1/4/91 submittal	February 15, 1991
• Results of 28 day re-test (see 11/2.1/90) verbally reported to PA by ENSECO	March 14, 1991
• PA submits response to Corps comments of 2/15/90 and submits 28 day data	March 19, 1991
• PA submits formal application with all test results to NJDEPE	March 27, 1991
• NJDEPE Permit expires	April 4, 1991
• Corps requests additional information (to PA 3/19/91 submittal on the data	April 29, 1991
• PA responds to 4/29/91 comments	May 9, 1991
• Corps requests additional "clarification of data"	May 22, 1991
• Corps requests additional "clarification of the data"	May 30, 1991
• PA responds to Corps 5/22 and 5/30 comments	June 13, 1991
• PA submits draft Risk Assessment (EA) report to Corps	June 19, 1991
• NJDEPE issues permit with no barge overflow	July 1, 1991
• PA responds to NJDEPE barge overflow - restriction	July 25, 1991
• Corps WES provides comments on EA.Report	August 6, 1991
• Interagency Dioxin Steering Committee meets	September 11, 1991
• Corps provides new sampling plan for re-testing of Reach A	November 15, 1991
• Corps issues 30 day public notice for Reaches B, C, and D states that Interim Guidelines for Dioxin have been established	November 25, 1991

(25 pp. capping)

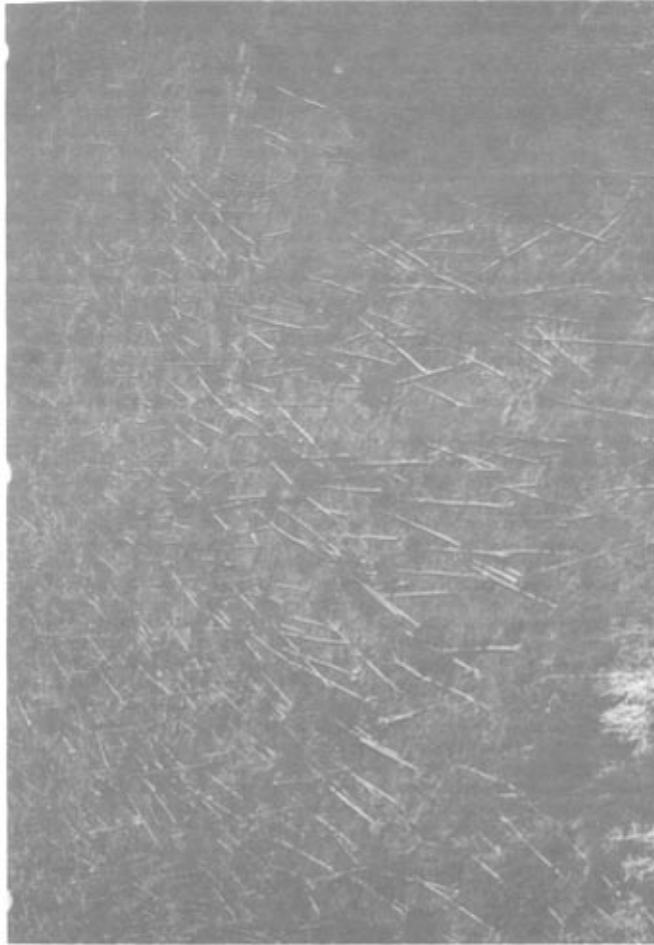
• Corps issues public notice announcing a public hearing (to be closed 3/6/92)	January 24, 1992
• Corps issues public notice which extends comment period to 3/16/92	February 21, 1992
• Public hearing held	February 24, 1992
• End of comment period	March 16, 1992
• Corps/EPA agree on interim guidelines for dioxin disposal	March 11, 1992.
• PA responds to EDF June 1992 critique of EA Report and EDF 3/16/92. comments on Public Notice	June 24, 1992
• PA responds to Public Notice/Hearing comments	June 18-26, 1992
• Letter, EPA to PA, stating further criticism of Risk Assessment	July 13, 1992
• Letter, EDP to Corps/EPA, questioning interim criteria, need for EIS (dioxin), baseline data at Mud Dump, more public noticing.	July 29, 1992
• Letter, EDP to PA still questioning interim criteria and Risk assessment	August 10, 1992
• Memo, PA, indicating Corps wants a dioxin pre-tested material or sand cap	September 11, 1992
• Letter, EPA to PA requesting further coordination on Risk Assessment information	September 25, 1992
• Letter, PA to Corps formally requesting modification of PNJE application to use Ambrose as second source cap	October 6, 1992
• Letter, NJDEPE to PA, modifying NJDEP Permit to include overflow monitoring	October 8, 1992
• Letter, PA to NJDEPE, accepting the 10/8/92 NJDEPE permit modification	October 9, 1992
• PA submits Reach A re-test data to Corps	October 14, 1992
• Corps issues Supplemental Public Notice for Ambrose cap	October 19, 1992

• EDF letter to Corps/EPA/NJDEPE/DEC/PA requesting EIS related to dioxin, PCBs and cumulative effect of sand mining	November 4, 1992
• F&WS letter, to Corps requesting extension of comment period on cap to 12/9/92	November 18, 1992
• Memo, PA, announcing meeting to be held between PA/Corps/EPA/NJDEPE/EDF	November 20, 1992
• Letter, Corps to PA transmitting comment letters' from cap supplemental Public Notice	November 24, 1992
• PA submits formal application for Reach A	November 19, 1992
• Letter, EPA to Corps approving Management Monitoring Plan at Mud Dump	December 4, 1992
• Letter, USF&WS to Corps stating objections to permit and referring to elevation procedures in event of Corps' issuance of the permit	December 9, 1992
• PA responds to cap Public Notice comments (other than 12/9/92 USF US letter)	December 9, 1992
• Letter, EPA to Corps, reneging on the 25 pptr criteria	December 31, 1992
• Letter, EDF to Corps/EPA mimicking EPA letter of 12 /31/92	January 4, 1993
• Corps issues permit for 500,000 cubic yards	January 6, 1993
• Letter, EDP to Corps/EPA/DEP, raising volume/testing issue	January 11, 1993
• Letter, EPA to Corps, mimicking DEF letter of 1/11/93 and reneging on ocean disposal	January 13, 1993
• Letter, PA to EPA, defending volume-testing issue	January 13, 1993
• Letter, Corps to PA, suspending permit	January 14, 1993
• Letter, EDF to Corps, objecting to volume of material and seeking re-testing of dredged material	January 13, 1993
• Letter, PA to Corps, requesting meeting on 1/19/93 to discuss permit issues	January 15, 1993

- Letter, Corps to PA, notifying PA that Corps and EPA are available to meet on 1/27/93 January 15, 1993
- Letter, PA to EPA, affirming volumes to be dredged January 26, 1993
- PA meets with Corps/EPA January 27, 1993
- EPA two-day conference on Dredging and Disposal of NY/NJ Harbor Sediments January 27, 28, 1993
- Letter, EDF to EPA, raises bio-accumulation issue throughout harbor and criticizes criteria level of 10 ppt January 29, 1993
- Letter, NMFS to EPA, raises Endangered Species Act issue February 2, 1993
- Corps and Port Authority meeting to clarify outstanding issues raised during suspension and 1/27/93 meeting February 4, 1993
- Congressional Forum on dredging February 5, 1993
- Letter, PA to Coast Guard requesting review of safe berth depth for facility February 9, 1993
- Letter, EPA to Corps, specifies conditions that have to be met for re-issuance of permit for Reaches B and C, while Reach D is acceptable without further testing February 12, 1993
- Letter, EDF to Corps, requesting a meeting and opposing EPA's decision not requiring additional testing for Reach D February 17, 1993
- Letter, Corps to PA, requiring all Reaches to be tested for dioxin using same methods as in 1990. February 18, 1993
- Letter, PA to EPA, seeking clarification and sign-off on sampling and testing protocols. February 24, 1993
- Letter, Corps to NMFS, answering Endangered Species Act issue. March 5, 1993



• Letter, PA to Corps (copy EPA) transmitting dioxin re-test results.	March 12, 1993
• Letter, EPA to Corps, approving material for ocean disposal based on the dioxin re-test results. -However, EPA likewise directed the-Corps to resolve concerns of the National Marine Fisheries Service regarding endangered species at the Mud Dump site.	March 29, 1993
• NMFS issues biological opinion on Endangered Species Act resulting in special conditions to be incorporated into the upcoming reissued permit.	May 6, 1993
• Reinstatement of permit by the Corps.	May 26, 1993
• Suit filed by Clean Ocean Action against the Corps.	June 1, 1993
• Commencement of Dredging.	June 2, 1993
• Issuance of order by Judge Debovoise regarding further testing, regulations and Green Book procedures.	July 6, 1993
• Completion of dredging.	July 7, 1993
• Commencement of capping.	July 12, 1993
• Commencement of surveys. -	Sept. 12, 1993
• Commencement of final capping.	Sept. 17, 1993
• Completion of capping.	October 13, 1993
• Commencement of surveys by Corps.	October 18, 1993
• Filing of briefs with Court. *	October 29, 1993



**EAST TEXAS WIND STORM -- SABINE NATIONAL FOREST**

February 10, 1998

102,000 acres

### Problems and Issues with the National Environmental Policy Act of 1969

A decade of '60s thinking was followed by a decade implementing the '60s thinking. The legislation of the '70s imposed upon the nation the thinking of the '60s. The National Environmental Policy Act of 1969 was a first in a series of these statutes. It was followed by the the Environmental Quality Improvement Act in 1970, Reorganization Plan No. 3 of 1970: Environmental Protection Agency, Reorganization Plan No. 4 of 1970: National Oceanic and Atmospheric Administration, Clean Air Amendments of 1970, Endangered Species Act of 1973, Energy Supply and Coordination Act of 1974, Surface Mining Control and Reclamation Act of 1977, and just to name a few examples.

The National Environmental Policy Act of 1969 (NEPA) attempts three objectives: a declaration of environmental principles, an establishment of procedure for federal agencies to consider environmental impact of major federal actions significantly affecting the quality of the human environment, and the establishment of a Council on Environmental Quality.

Today this Council on Environmental Quality (CEQ) is responsible for many of the policies and programs with which the Committee on Resources routinely deals. It was modeled after the Council of Economic Advisors. For the most part, however, CEQ operates out of the lime light and behind closed doors. Housed in the Old Executive Office Building, CEQ is an agency in the Executive Office of the President. It advises the President on environmental matters, recommends programs to the President, puts together the annual Environmental Quality Report, works with the State Department and EPA to develop international environmental policy, and oversees the preparation of Environmental Impact Statements (EIS's).

In the original authorizing legislation the Council on Environmental Quality comprised "three members who shall be appointed by the President to serve at his pleasure." This past October, in the VA-HUD Appropriations Bill this authorizing language was changed. The FY '98 appropriations authorized that "the Council shall consist of one member, appointed by the President, by and with the advice and consent of the advice and consent of the Senate, serving as Chairman and exercising all powers, functions, and duties of the Council." Both the procedural issue of authorizing on an appropriations bill and the substantive issue of having a one-person council are raised.

Because specific, clear guidance was not provided by CEQ regarding preparation of EIS's, the courts have attempted to define many issues relevant to NEPA. The courts have found the declaration of environmental principles not to be judicially enforceable. It is the procedural aspects of NEPA which are the "action-forcing" provisions of NEPA. For these procedures, the courts have had to decide who must comply, what constitutes a "major federal action that significantly affects" the environment, and many other aspects.

Early versions of the legislation contained neither policy and goals nor the procedural requirements that has become the heart of the legislation. These elements were added hastily

only after different versions had passed both the Senate and the House and after a decade of debate in Congress.

With Executive Order No. 11514 president Nixon directed CEQ to issue guidelines to federal agencies for the preparation of EIS's. CEQ issued these guidelines in April of 1971. Subsequently, President Carter by Executive Order No. 11991 authorized CEQ to adopt regulations rather than guidelines on EIS preparation. In 1978 CEQ adopted regulations that attempted to reflect the its earlier guidelines and the numerous court decisions regarding NEPA. CEQ's regulations require federal agencies to identify three typical classes of action: 1. normally requiring an EIS, 2. normally requiring an Environmental Assessment (EA) but not necessarily an EIS, and 3. normally requiring neither an EIS nor an EA. This last category is referred to as categorical exclusions (CE's or CX's).

A key question to be answered when determining whether an action will trigger the need for an EIS is whether it constitutes a "major federal action significantly affecting the quality of the human environment." The need for permits, licenses, and other approvals from a federal agency program have triggered NEPA compliance in what might otherwise seem a non-federal action. In determining what is "significant", the context and severity of the impact are considered. In theory, consideration is to be given to social, cultural, and economic factors as well as those to the natural environment.

In reality, such federal action is often requested of an agency by an "applicant". Examples of applicants include tribes, charities sponsoring 5K foot races, builders of roads, airlines, mineral prospectors, and cattlemen. "Mitigation" refers to the measures taken by applicants to prevent, reduce, or alleviate environmental impacts.

Environmental assessments are used as a screening document to determine whether an agency must prepare an EIS or make a Finding Of No Significant Impact (FONSI). Most agency procedures do not require public involvement prior to finalizing an EA document. A FONSI presents the reasons why an action, not otherwise categorically excluded, will not have a significant effect on the human environment.

If it is determined that a proposed federal action, or non-federal action having sufficient federal involvement, does not fall within a designated categorical exclusion or does not qualify for a FONSI, then the responsible federal agency must prepare an EIS. The proposed action may be one where several agencies have some responsibility and all must comply with NEPA. Then CEQ regulations provide for a "lead agency" to take primary responsibility for the preparation of the EIS and to supervise the process. Other agencies which have particular expertise in the field(s) that the project indicates may become "cooperating agencies." If a disagreement should arise among the agencies as to which agency should be the lead agency or a cooperating agency, CEQ can be asked to make the necessary decision. The lead and cooperating agency concepts are supposed to avoid duplication and enhance cooperation among agencies.

When the lead agency publishes a notice of intent to prepare an EIS, it initiates the first step—the “scoping” process. Comments are solicited on the scope of actions, alternatives, and impacts to be considered. The scoping process is used to identify significant issues requiring in-depth analysis and make preliminary assignments concerning the EIS preparation among the lead and cooperating agencies. The lead agency may also call for scoping meetings to discuss these issues with the public. The scoping process also provides an opportunity for the lead agency to set reasonable boundaries on the timing, content, and process that will be used for the EIS. It may also be used to restrict new subjects from being introduced later to challenge the agency's decision, though this is rarely done.

After the scoping process is completed, the agency collects and assimilates the information needed for the EIS beginning with materials prepared for the EA or supplied by the applicant. Agencies frequently “allow” an applicant to submit environmental information, lest the project be delayed for want of information. Many complaints are heard that this practice amounts to “blackmailing” applicants into effectively paying for the EIS, or else the project is delayed indefinitely. Likewise, agencies have been known to suggest that applicants pay for persons to review the material submitted by the applicant. The agency remains responsible for the scope and content of the material submitted by the applicant.

NEPA requires social, cultural, and economic impacts to be considered in an EIS, along with the environmental impacts, and “reasonable” alternatives to the proposed action. However, loud hues and cries are heard from citizens who state that the social, cultural, and economic impacts are given short shrift and are practically and comparatively ignored.

If there is incomplete or unavailable information, the agency is directed to include within the EIS a statement that such information is incomplete or unavailable. In practice, however, applicants report that the agency will often request that the applicant obtain and provide such information, often at huge expense.

Proposals for legislation require the preparation of an EIS when they come from an agency. Often, however, the President will propose legislation. The President is not included in the definition of “federal agency”. Notably, however, CEQ is a “federal agency” which must comply with NEPA when proposing legislation. The majority staff of the House Committee on Resources recently prepared a report regarding CEQ's involvement in proposing the Grand Staircase-Escalante National Monument in Utah. Such involvement is currently the subject of three law suits (which may be consolidated).

Increasingly agencies are finding ways to shift the costs of their compliance with NEPA to those requesting some federal action or decision.

Only the Environmental Protection Agency (EPA) enjoys limited exemption from NEPA. By Memorandum of Understanding between CEQ and EPA as well as by Section 309 of the Clean Air Act, EPA assumed the review of, commenting upon, and grading of all Environmental Impact Statements.

Congress can and has allowed statutory exemptions from NEPA requirements for particular projects.

Today, various levels of planning may require an EIS. Take for example the Forest Service, which does more NEPA work than any other agency—roughly 100 EIS's, 5000 EA's & 10000 CE's per year. A timber sale within a forest may have an EIS. One step up, a forest plan requires an EIS. Another step up, regional (multiple forests) plans such as the Pacific Northwest Forest Plan may have an EIS. Finally, a nationwide rule such as the proposed road-building moratorium has an EIS. This different levels of EIS's may have different levels of specificity, but some citizens are asking for comparable detail in all of them.

Another recent issue regarding NEPA includes NEPA's extraterritorial application. President Carter issued Executive Order No. 12114 providing that environmental considerations be given to actions having effects outside the geographical boundaries of the United States. Notwithstanding this Executive Order, the courts have found that EIS's are not required extraterritorially because Congress did not "provide a clear expression of legislative intent through a plain statement of extraterritorial statutory effect."

Staff Contact: Aloysius Hogan, x63927

**JIM TURNER**  
26 District, Texas  
  
COMMITTEES:  
NATIONAL SECURITY  
GOVERNMENT REFORM  
& OVERSIGHT  
  
1508 Longworth House Office Building  
Washington, DC 20515-2217  
(202) 225-2451  
e-mail: JTURN2@mail.house.gov



**Congress of the United States**  
**House of Representatives**  
Washington, DC 20515-4302

February 18, 1998

DISTRICT OFFICES:  
781 N. First Street, Room 201  
LURGIN, TX 79401-1208  
(409) 827-1770  
  
420 W. Green Avenue  
ORANGE, TX 77630  
(409) 863-6990  
  
805 E. Collier  
Suite 102  
CROCKETT, TX 75835  
(409) 844-8414

The Honorable Al Gore  
Vice President of the United States  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear Mr. Vice President,

Thank you for visiting with me last Thursday at the freshman Democrat meeting about the severe damage sustained in our East Texas national forests by high winds that swept through the area on Tuesday, February 10.

Since our visit, I have personally toured a multi-county area in my congressional district to take a first-hand look at the damage, and I can assure you, we have never had a weather event in East Texas like this one before in anyone's memory. In one afternoon, more timber was felled in two East Texas national forests than has been felled by clear cutting in the past decade. Approximately 270 million board-feet of timber has been destroyed, which is almost four times the volume of timber harvested from these two national forests in an average year. However, the damaged timber in the national forests represents only a small fraction of the total timber loss and property damage sustained by the residents of the 2<sup>nd</sup> Congressional District.

Although we were fortunate there was no loss of life or serious injury, there was, however, significant property damage to homes, businesses and public utilities. I have requested the assistance of the Federal Emergency Management Agency and the State of Texas Disaster Evaluation Teams to determine our eligibility for federal disaster relief.

One issue that I would request your immediate assistance on is the need to move quickly to salvage and remove the timber from the national forests. During my tour of the storm damage, I noted that private landowners began immediately to salvage the damaged timber on their private lands. Every day that passes reduces the value of the fallen timber. And equally important, there are some very pressing environmental reasons for prompt action.

Under the National Environmental Policy Act (NEPA), there are certain procedures required which will delay a timely removal of the damaged timber. The U.S. Forest Service will soon be submitting an application to the Council on Environmental Quality (CEQ) for an exemption from the regulations under the NEPA to deal with this emergency. The application will

Page 2  
February 18, 1998

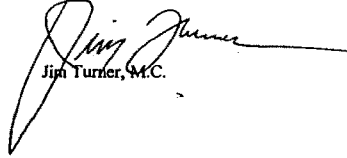
cite several sound environmental reasons for granting this waiver.

However, not only do the environmental considerations overwhelmingly dictate that the regulations be waived, but from a very practical point of view, over 270 million board-feet of damaged and / or destroyed timber is on the ground, which if promptly removed will yield an estimated \$30 million. This money would be, by law, divided 75% to the federal government and 25% to the county governments and school districts in the East Texas counties where the timber is located.

If we fail to secure the exemption from the CEQ, the timber will become unmarketable and without value, and the cost of clean-up to the federal government is estimated to be \$25 million. In other words, quick action in removal of this timber will gain us an estimated \$30 million, but failure to act will cost an estimated \$25 million.

Again, I thank you in advance for your assistance in this matter. This is one time I hope we can assure the people of East Texas that we have reinvented government in a positive way. Your prompt attention on this matter will assure the people of East Texas that common sense will govern over strict regulation in times of emergency. If you have any questions or need additional information, please feel free to call me or my Chief of Staff, Elizabeth Hurley, at 202-225-2401.

Sincerely,



Jim Turner, M.C.

JT:eh  
Enclosure





# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Ecological Services  
Stadium Centre Building  
711 Stadium Drive, Suite 252  
Arlington, Texas 76011

February 18, 1998

11B 20 98

Mr. Ronnie Raum, Forest Supervisor  
National Forests and Grasslands in Texas  
701 N. 1st Street  
Lufkin, Texas 75904

**RE: Initiation of emergency consultation on windstorm related impacts to red-cockaded woodpeckers (RCW) in the North Sabine Habitat Management Area (HMA), Sabine National Forest, Shelby County, Texas**

Dear Mr. Raum:

This correspondence documents U.S. Forest Service initiation of Emergency Consultation under section 7 of the Endangered Species Act with the U.S. Fish and Wildlife Service (Service) on February 11, 1998, in accordance with 50 CFR 402.05.

You requested that Fish and Wildlife Biologist Jeffrey A. Reid report to the Incident Command Center at the Dreka Work Center on the Sabine National Forest to assist in the assessment of impacts to RCW clusters and recommend measures to offset the impacts. A RCW Damage Assessment and Mitigation Team was formed, impacts to the 10 clusters within the North Sabine HMA occupied by RCW groups were assessed, and 31 artificial inserts were installed within 9 clusters where active cavity tree loss was substantial. Preliminary estimates of damage indicate that approximately 15,000 acres of mature pine/pine-hardwood habitat was extensively damaged on the Sabine National Forest which may involve as much as 211 million board feet of timber.

Insert installation was accomplished in clusters 39-5, 62-2, and 62-4 on February 12, and clusters 30-1, 29-4, 44-1, 55-4, 55-5, 62-3 on February 13. In cluster 62-4 where only one cavity tree remained standing after the windstorm, two RCWs were observed inspecting the inserts approximately 15 minutes after installation. The enclosed table (Table 1) indicates how many RCWs were known before the storm, how many active usable cavity trees remained in each cluster after the storm, how many inserts were installed to offset the loss of active cavity trees, and the number of RCWs observed within these clusters February 11-13, 1998.

The following are additional Service recommendations intended to minimize the effects of the emergency response action on RCWs. Immediate removal of windthrown trees is recommended in all RCW cluster, replacement, and recruitment stand boundaries to:

- 1) decrease the risk of southern pine beetle and Ips attacks within these areas;
- 2) protect the existing cavity trees from excessive fuel build-up;

- 3) facilitate biologist access to the cluster so the extent of the impacts can be fully accessed and additional mitigative measures implemented, if needed.

It is imperative that the roads to the active clusters be cleared and the windthrown timber be removed from the active RCW clusters within the next few weeks for the reasons stated above. The general RCW breeding season begins on March 1. However, we believe that actions such as removing windthrown trees can be conducted within active RCW cluster boundaries until March 31 without adverse effects to breeding activities. Conducting such actions after this date could alter breeding and nesting activities within these clusters. Additionally, all inactive clusters and recruitment stands within the North Sabine Habitat Management Area should be systematically inspected for storm damage and possible undocumented use by RCWs. If RCW activity is discovered in any of the areas, immediate measures should be implemented to offset the storm related impacts.

Failure to implement these actions could result in further adverse impacts to the RCW population on the North Sabine RCW Management Area. As required by 50 CFR 402.05, once the emergency situation is under control, the U.S. Forest Service must initiate formal consultation with the Service for the actions implemented in response to this emergency.

Please direct all communication and correspondence to Fish and Wildlife Biologist Jeffrey A. Reid of my staff at (409) 639-8546.

Sincerely,

  
Robert M. Short  
Field Supervisor

Enclosure

cc: District Ranger, Sabine National Forest, Hemphill, Texas  
RCW Coordinator, Southern Research Station, Nacogdoches, Texas  
Jeffrey A. Reid, FWS, Lufkin, Texas

**TABLE 1. RCW CLUSTER AND GROUP IMPACTS RESULTING FROM THE 10 FEBRUARY 1998 WINDSTORM IN THE NORTH SABINE RCW HABITAT MANAGEMENT AREA, SHELBY COUNTY, TEXAS**

Active RCW Cluster	# RCWs prior to the storm*	# usable active cavities standing after storm**	# inserts installed after storm***	# RCWs heard or seen after storm
30-1	3	3	2	0
39-2	1 or 2	3	0	0
39-4	4 or 5	5	2	1 or 2
39-5	2	0	3	0
44-1	2	1	4	0
55-4	3	1	4	1****
55-5	2 or 3	2	4	4
62-2	2	1	4	3
62-3	2 or 3	0	4	2
62-4	2	1	4	2
10 clusters	23 or 27	17	31	13 or 14

\*Group size obtained from Sabine National Forest Wildlife Biologist Lee Carolan via telephone on February 11 and 12, 1998.

\*\*RCW Damage assessment Crew included Rick Schaefer, Jeffrey A. Reid, M. Stephen Best, Chris Collins, Shirley Burgdorff.

\*\*\* Artificial insert installation crews included Ron Haskins, Keith Butler, Russell Duty, Steve Best, Jeffrey A. Reid

\*\*\*\*Possible storm-related RCW fatality in cluster 55-4 discovered by Rick Schaefer and Shirley Burgdorff.



United States  
Department of  
Agriculture

Forest  
Service

Washington  
Office

14th & Independence SW  
P. O. Box 96090  
Washington, DC 20096-6090

File Code: 1950

Date: MAR 4 1998

Ms. Kathleen A. McGinty  
Chair  
Council on Environmental Quality  
722 Jackson Place, N. W.  
Washington, D.C. 20503

Dear Ms. McGinty:

Per 40 CFR 1506.11, we are requesting alternative arrangements with the Council for an emergency situation caused by the February 10 windstorm on the National Forests and Grasslands in Texas (NFGT). To assure a timely response to this emergency, we are asking the Council for the arrangements as outlined in the enclosed briefing paper. The agency would like to begin work on this emergency through any arrangements granted by March 16.

On February 27, Forest Supervisor Ronnie Raum and I met with Dinah Bear of your staff to discuss this situation. Other Forest Service employees were present as were representatives from the Environmental Protection Agency and USDA Office of the General Counsel.

This windstorm caused varying degrees of damage on 103,000 acres of forested land on the NFGT. We believe that it would take up to 6 months, under our agency's National Environmental Policy Act procedures, to implement necessary action to restore this damaged ecosystem. This delay could result in further threatened and endangered species habitat loss this spring and summer from high intensity wildland fires and bark beetle attack. We are most concerned about red-cockaded woodpecker (RCW) and bald eagle habitat, and that delay will cause undue risk to adjacent private property.

Emergency actions involve the removal of wind thrown trees from the national forest. We will remove dead, down, and severely root-sprung trees where mortality is expected. Trees that are likely to survive will not be cut under this request except to provide for worker safety. Any live tree cutting for worker safety will be allowed under standards established by an interdisciplinary team. Additionally, no trees will be removed from riparian areas unless their removal is recommended by an interdisciplinary team to prevent damage to aquatic habitat, abate soil erosion, or to restore natural hydrologic regimes.

The attached briefing paper includes information on adverse affects that are still affecting the RCW populations on the Francis Marion National Forest as a result of not removing Hurricane Hugo damaged trees in 1989, as well as, how timber removal reduces the threat of bark beetles. The paper,



Caring for the Land and Serving People


Printed on Recycled Paper



also, explains anticipated fire effects from the windstorm, a forest health evaluation, and our proposed public meetings.

If you have any questions concerning this request, please contact Rhey Solomon, Deputy Director Ecosystem Management Coordination, at 205-0939.

Thank you for your time and consideration.

A handwritten signature in black ink, appearing to read "Robert C. Joslin".

ROBERT C. JOSLIN  
Deputy Chief, NFS

Enclosure (2 copies)

234

BRIEFING ON  
THE FEBRUARY 10, 1998  
WINDSTORM THAT DAMAGED  
103,000 ACRES OF NATIONAL  
FORESTS IN DEEP  
EAST TEXAS



March 4, 1998

## INTRODUCTION

On February 10, 1998, a fierce storm packing hurricane-force winds struck the rain-soaked forests of deep east Texas. The storm front passage lasted only 20 minutes, but in its path from near Houston until it crossed Toledo Bend Reservoir into Louisiana (a distance of 150 miles), it left a swath of woodland destruction reminiscent of Hurricanes Hugo and Opal. Fortunately, no lives were lost and damage to private residences and businesses was scattered. However, over 103,000 acres of the Sabine, Angelina, and Sam Houston National Forests (NFs) were damaged severely enough that emergency response is needed. Twelve thousand of those damaged acres have lost so many existing trees that extensive restoration efforts are needed.

The National Forests and Grasslands in Texas (NFGT), responsible for management of the three impacted forests, must act quickly to abate further damage to this Coastal Plains Pine-Forested Ecosystem. Paramount to this effort are: (1) reduction of extensive downed fuel loadings before spring and summer fires grow into potential conflagrations in an area of intermingled private property; (2) stabilization of active red-cockaded woodpecker (RCW) clusters and foraging habitat to prevent declines of a RCW population needed to recover this endangered species; and (3) reduction of risk from bark beetle attack to remaining trees to prevent further damage to RCW habitat, bald eagle habitat, and private timber resources.

Failure to act expediently can result in: (1) major wildland fires that threaten private residences, even rural subdivisions along Toledo Bend Reservoir; (2) loss of a sub-population of RCW critical to the survival of this endangered bird; and (3) widespread bark beetle infestations that can kill additional RCW and bald eagle habitat, as well as spread to private timber resources. The results of any or all of these occurrences will seriously compromise forest health on the impacted areas for many years.

U. S. Forest Service experience dealing with the environmental effects of Hurricane Hugo on the Francis Marion National Forest shows that not removing the large woody debris blown down by that storm has contributed to a decline in one of the nation's largest RCW populations. Where downed trees were left following Hugo, the Francis Marion NF is unable to use prescribed fire needed to maintain and perpetuate a healthy coastal plains pine ecosystem. The lack of prescribed fire use has resulted in significant mid-story encroachment which is detrimental to the RCW.

Normal timeframes required to comply with the National Environmental Policy Act (NEPA) would delay needed abatement efforts and could adversely impact human life, private property, and endangered species. Therefore, the NFGT requests alternative arrangements from the Council of Environmental Quality (CEQ) for NEPA compliance for immediate tree removal actions, and that will also provide public input, documented environmental analysis, on-site effects monitoring, and full NEPA compliance for longer-term restoration actions. Arrangements agreed to must allow adaptation to meet changing site conditions as well as capitalize on new information gathered as the emergency response unfolds.

#### PROPOSED ACTION

The proposed actions for which we seek alternative arrangements is the immediate removal of dead, damaged, and severely root-sprung trees along approximately 150 miles of road ways and on approximately 23,000 acres of the NFGT for RCW habitat protection and fuels reduction (Priority 1, 2, and 3). In addition, we seek concurrence for use of an environmental assessment in lieu of an environmental impact statement for approximately 70,000 acres for bark beetle risk reduction (Priority 4). This paper explains the actions to be taken and the reasons for these actions.

#### DAMAGE ASSESSMENT

The February 10, 1998 windstorm damaged over 103,000 acres of the Sabine, Angelina, and Sam Houston NFs. The storm contained hurricane-force winds recorded in excess of 130 miles per hour at one recording station and struck an area saturated by above-average rainfall. The national forest damage occurred in areas of heavily intermingled public-private ownership where over 50 percent of the land base within each of the national forest proclamation boundaries is privately owned (*see attachment A maps*).

These areas consist of scattered private residences, concentrations of private residences in rural subdivisions and small towns, private wood lots, and larger areas of forest product industry lands. The areas impacted are highly roaded with a combination of NFGT forest development roads, state maintained farm-to-market roads, county maintained rural routes, federal highways, and industry-constructed roads. Road densities for the impacted areas of the three national forests are 7.0 miles of federal, state, and county roads per 1,000 acres on the Sabine National Forest (NF); 4.8 miles per 1,000 acres on the Angelina NF; and 6.6 miles per 1,000 acres on the Sam Houston NF. Damage to the national forest timber resource appears to be more extensive on timber stands that are predominately southern yellow pine greater than 60 years old. Younger stands resulting from more recent even-aged management exhibit little to no damage.

Damage to the federal timber resource includes trees that have been uprooted and now are lying on the ground, that have been broken off at varying heights above the ground, and that have been so severely root-sprung that they cannot reasonably be expected to survive (*see attachment B photos*). To characterize the varying degrees of damage to the timber resource, the NFGT chose the following damage descriptors:

- **Extensive damage:** Loss of greater than 60 percent of the existing trees within a stand and will require significant reforestation efforts.
- **Moderate damage:** Loss of 30 to 60 percent of the existing trees within a stand and must be evaluated for appropriate reforestation efforts.
- **Light damage:** Loss of 10 to 30 percent of the existing trees within a stand. These stands will be evaluated but will not likely require reforestation efforts. However, these stands will require action to minimize risks from bark beetle activity.



The NFGT received minor damage to trees across a much larger area than the 103,000 acres identified below. However, damage on many of the additional acres involves only a few trees per acre and will require no action.

Table 1. Summary of Preliminary National Forest Timber Damage by Forest and Damage Class in Acres.

National Forest	Extensive Damage	Moderate Damage	Light Damage	Total
Sabine	10,000	54,200	5,800	70,000
Angelina	1,500	10,700	17,300	29,500
Sam Houston	100	500	2,900	3,500
Total	11,600	65,400	26,000	103,000

The NFGT estimates that approximately 297,000,000 board feet of timber have been killed, enough material to provide the wood products needed to construct approximately 25,000 new homes.

The Federal forest resource is habitat to the endangered RCW, a woodpecker that drills its cavity in live pine trees. Twenty-one active RCW clusters spanning the three national forests were damaged by the storm. Two active clusters on the Sabine NF were totally destroyed when all cavity trees were downed. RCW mortality was observed. Emergency installation of artificial cavity inserts has been completed by an RCW Assessment Team in hopes of temporarily stabilizing active RCW clusters. Thousands of acres of RCW habitat designated by the NFGT 1996 Revised Land and Resource Management Plan (RLRMP) to be managed in accordance with guidelines agreed to by U.S. Fish and Wildlife Service (USFWS) for the recovery of the RCW have been extensively damaged. Approximately 10,700 acres out of the total 11,600 acres of extensive damage occurred within RCW Habitat Management Areas (HMAs), while some 45,000 acres of the 65,000 acres receiving moderate damage occurred within RCW HMAs. Both USFWS and National Forest Research Scientists are urging immediate removal of damaged trees from portions of RCW habitat to minimize further impacts to the endangered species (*see attachments D, E, & J*).

Although downed trees will exhibit significant decay and deterioration over the next two to four months, they will not disappear completely. Downed trees not removed in a timely manner will create prescribed fire problems similar to the problems experienced on the Francis Marion NF following Hurricane Hugo. It is imperative that as many trees as possible be physically removed from the three impacted forests. Failure to remove these trees will create adverse impacts that limit fire control within an area of intermingled private/public ownership, eliminate cost-effective methods for maintaining habitat crucial to the recovery of an endangered species and overall have a negative effect on forest health of the NFGT as previously discussed (*see attachment G*).

There are many miles of common boundary lines between national forests and private property

in the impacted area. Dozens of miles of these boundary lines have been extensively damaged where national forest trees have fallen onto private property. National Forest Law Enforcement Officers have investigated dozens of claims of damage to private property by fallen federal timber. Of much greater concern is the potential that greatly increased fuel loadings along common public-private boundaries will create disastrous wildland fire situations. Fuel loadings have increased five to twenty-five fold over normal fuel loadings associated with southern yellow pine ecosystems. Fire suppression equipment normally used by state and federal wildland fire suppression agencies cannot effectively stop wildfire spread in such heavy fuel concentrations. Committing fire suppression personnel and equipment into the storm-created fuel loadings would endanger human life (*see attachment I*).

#### NFGT OBJECTIVES FOR EMERGENCY RESPONSE

There are three objectives that will guide any actions taken to respond to this windstorm emergency. Any emergency action taken must:

1. Reduce the potential for high intensity wildland fires spreading into the intermingled private ownerships that include individual homes, subdivisions, and rural communities;
2. Minimize further damage to RCW and bald eagle habitat; and/or
3. Reduce the risk of anticipated bark beetle attack to living trees that could kill additional federal and private timber, and RCW and bald eagle habitat.

#### SHORT-TERM ACTIONS NEEDED TO ADDRESS EMERGENCY RESPONSE OBJECTIVES

There are four short-term actions that must be initiated in the near future to meet the emergency response objectives. The NFGT has prioritized these actions as follows:

- Priority 1. Remove fallen and hazard trees from existing forest development roadways to serve as primary fire control lines, facilitate further damage assessment access to RCW areas, and provide increased safety for personnel working on this emergency. Approximately 150 miles of existing roadways are blocked by fallen trees and require tree removal. Some existing roadways (state, county, and forest development) that access private property have received limited work to allow for vehicular traffic. However, trees sawn out of these roadways have simply been pushed to the side of the road right-of-way but not physically removed. These sawn trees need removal to reduce fire hazard.

Actions to clear roadways must begin immediately. The NFGT's most severe fire weather occurs in the spring and summer. Fire suppression equipment currently used by both the NFGT and State of Texas Forest

Service cannot operate safely with the large fuels that litter the forest following the storm. Clearing roadways will allow firefighters a first line of defense.

- Priority 2. Remove dead, down, and leaning trees in and within 300-500 feet of all RCW active clusters, replacement, and recruitment stands (see recommendations from USFWS and U.S. Forest Service (USFS) researchers, *attachments D, E, & J*). This action is needed to reduce further damage to this endangered species habitat from bark beetle attack and intense wildfire, plus provide opportunities for additional mitigation efforts prescribed by scientists familiar with RCW. Scientific studies conducted following Hurricane Hugo on the Francis Marion NF of South Carolina show a link between RCW population declines and the inability to conduct necessary prescribed burns due to heavy accumulations of dead and down timber that was not removed following the hurricane (see *attachment H*). Lack of prescribed burning for RCW in South Carolina has prevented resource managers from maintaining healthy RCW habitat.

This action must begin immediately and be completed by March 31, 1998 to avoid disturbance to the RCW during their breeding season.

Approximately 1,000 acres require this action.

- Priority 3. Reduce increased fuel loadings created by the mass of fallen trees and tops to avoid potential catastrophic fires. This action would be taken in areas that adjoin private property or where extensive damage has created a potential "blowup" fuel loading condition.

Fuel reduction efforts must begin immediately as the east Texas spring and summer fire season is rapidly approaching. Many private citizens have begun to burn storm debris and any escaped fires from debris burning pose a serious threat to other private property, RCW and bald eagle habitat, and firefighter safety.

Approximately 22,000 acres require this action.

- Priority 4. Reduce the risk of bark beetle attack on remaining live trees. Downed and damaged trees provide suitable host material for bark beetles, especially between April and October. The southern pine beetle (SPB) may attack leaning, root-sprung trees. The Sabine, Angelina, and Sam Houston NFs experienced an increase in SPB activity in 1997, and further population increases in 1998 have been predicted by entomologists in both the U.S. and Texas Forest Services (see *attachment K*). With the mild winter temperatures to date, many SPB should emerge within the next month, and the leaning, root-sprung trees could serve as focal points for the initiation of SPB spots. The storm damage therefore could lead to an increase in the

number of instations on public and private lands, threatening RCW and bald eagle habitat as well as other forest resource values. Downed and broken trees are subject to attack by pine engraver (Ips) beetles.

Action should be initiated by April 1, 1998.

Approximately 70,000 to 80,000 acres require this action.

#### TECHNIQUES AVAILABLE TO ACHIEVE THE EMERGENCY RESPONSE OBJECTIVES

There is only one reasonable emergency response available to the NFGT to meet the three emergency response objectives. This response requires physical removal of the majority of dead, down, and severely root-sprung trees. Immediate emergency response would concentrate on removing the larger tree boles followed by a variety of fuel reduction techniques to either physically remove or mechanically reduce tree tops, downed limbs and smaller fire fuels. A discussion of anticipated environmental effects is found as attachment C.

Tree bole removal techniques may include the following: aerial removal by helicopter in areas of highly saturated soils; ground removal by mechanized equipment capable of distributing low pound per square inch pressure on wet and sensitive soils; or ground removal by more conventional crawler tractor and/or rubber tired skidding equipment.

Reduction of finer fuels found in tree tops and limb debris would be accomplished by any number of techniques such as mechanically topping and scattering, chipping, prescribed fire in areas properly secured to reduce the risk that fire would escape onto private property, and other environmentally sensitive techniques recommended by an Interdisciplinary Team (IDT) of resource management specialists.

None of the affected area is "roadless", and the NFGT would be exempt from the proposed agency suspension of road construction in roadless areas in the National Forest Service system because the NFGT RLRMP became effective June, 1996. Removing the large volume of downed trees will require some reconstruction of part of the extensive federal, state and local road network. However, removal techniques that will allow use of existing roads, and thus avoid new permanent road construction, will be utilized to the maximum extent possible. Significant maintenance of the existing roads in the three national forests will be required to accommodate the removal of these large numbers of trees. Relatively large tree storage areas (log decks) will be needed for trees removed by helicopter from areas with saturated soils.

#### PROPOSED ALTERNATIVE NEPA ARRANGEMENTS

The NFGT requests the CEQ to allow us alternative arrangements in accordance with 40 CFR 1506.11, as normal timeframes for NEPA compliance will not meet emergency response needs. The alternative arrangement would be limited to the four short-term (priority) actions needed to address emergency response objectives previously noted.

In lieu of normal NEPA compliance, the NFGT proposes the following:

1. Limit the removal of trees to those already down, dead, or severely root-sprung such that mortality is highly probable. Avoid cutting of undamaged live trees except for instances of worker safety. Due to the large scale damage, it is imperative that living, undamaged trees be protected for RCW cavities and foraging and to meet reforestation needs (*see attachments N & O*).

Some live trees may need to be cut to allow low psi equipment to work safely within the damaged areas. Each live tree cutting must be in accordance with standards established by an interdisciplinary team (IDT) and approved by the Incident Commander.

Avoid tree removal from riparian areas unless removal is recommended by a fisheries biologist, soil scientist, and hydrologist. Trees will be removed from riparian areas only if needed to prevent damage to fisheries habitat, abate soil erosion, or is necessary to restore natural hydrologic regimes.

2. Conduct a public meeting in San Augustine, Texas to gather input about public concerns prior to initiating emergency response. Public concerns will be used to mitigate or alter the way in which tree removal is conducted. San Augustine is chosen because it is central to the most severe damage on the Sabine and Angelina NFs. This public meeting is scheduled for March 7, 1998 (*see attachment L*).
3. Develop a longer-term public involvement strategy that encourages input from a broad segment of the American public that can be used by an IDT as it evaluates tree removal technique options (*see attachment M*).

Periodically the NFGT will inform the public of progress and monitoring results of these actions.

4. Utilize an IDT of resource management specialists to prioritize tree removal areas and identify where various removal techniques would be employed. Removal techniques will consider degree of ground disturbances, soil types, soil saturation, worker safety, threatened and endangered species (TES) species, and other factors the IDT deems appropriate. The IDT will give special consideration to riparian areas, sensitive soils, RCW habitat management areas, unique plant communities, and any other special areas identified. All tree removal actions will be conducted in accordance with the standards and guidelines found in the RLRMP and additional mitigation deemed necessary by the IDT.
5. Consult with other federal and state agencies such as USFWS, Natural Resource Conservation Service, Texas Parks and Wildlife Department, Texas State Historic Preservation Officer (SHPO) (*see attachment P*), and State of Texas Forest Service to ensure tree removal is in accordance with various federal statutes, state

orest management practices, and generates the least environmental disturbance practicable.

The NFGT and the Texas SHPO had previously entered into a Memorandum of Understanding that addresses heritage resource inventory and antiquities law compliance resulting from catastrophic events such as this emergency. The USFWS and the NFGT have been in constant informal Endangered Species Act consultation since the second day of this emergency. An employee of the USFWS is located in the NFGT Forest Supervisor's Office and provides day-to-day inter-agency consultation. The Texas Forest Service and NFGT are coordinating joint agency responses to the rapidly increasing wildland fire danger. Texas Parks and Wildlife Department has assessed impacts to bald eagles and is assisting with RCW consultation.

Initiate formal Section 7 (Endangered Species Act) consultation with USFWS as requested by the USFWS letter of February 18 (*see attachment D*).

6. Maintain a project folder that documents the rationale that leads to tree removal priorities, removal technique selection, and mitigation measures in excess of RLRMP standards and guidelines. Periodically inform a broad segment of the public regarding decisions made to respond to this emergency.
7. Provide an on-site monitoring team of resource management specialists to ensure quality resource management, document environmental effects, and prevent significant adverse effects from occurring. Every effort will be made to include other agency personnel on the monitoring team. The monitoring team will review: (1) compliance with the removal technique decisions; (2) implementation of applicable RLRMP standards and guidelines; (3) implementation of additional mitigation measures required by the IDT and (4) promptly inform the NFGT Forest Supervisor of significant adverse environmental effects. The NFGT Forest Supervisor will take appropriate actions to reduce significant adverse effects, including termination of tree removal activities, to reduce or abate those significant adverse effects:
8. An environmental assessment in lieu of an environmental impact statement for approximately 70,000-80,000 acres for bark beetle risk reduction (Priority 4 areas). It is our intent to use a 7 day scoping period.
9. Provide continuous feedback to the CEQ on progress and status under any alternative arrangements provided.

In addition to these items that specifically address the four short-term actions, the NFGT will conduct the appropriate NEPA analysis process with full public participation to determine what actions will be taken to reforest and restore the acreage damaged by the windstorm. The NFGT would initiate the appropriate NEPA process by June 1, 1998.

ATTACHMENTS

- A. Maps of the Sabine, Angelina, and Sam Houston NFs indicating areas of damage.
- B. Photos depicting actual conditions following the 2/10/98 windstorm.
- C. Environmental effects of the agency proposed action
- D. February 18 letter from USFWS to Forest Supervisor recommending immediate actions needed to protect RCW.
- E. Letter from RCW Damage Assessment Team to Forest Supervisor recommending actions needed to protect RCW.
- F. Letter from Texas Parks and Wildlife Department assessing damage to bald eagle nests and recommending action.
- G. Forest Health Evaluation of Storm Damage by Stephen Clarke and Nolan Hess.
- H. Information concerning the USFS experiences with RCW populations on the Francis Marion National Forest following Hurricane Hugo.
- I. Basic fire effects and risk analysis following Texas windstorm.
- J. Additional information from USFWS dated March 2.
- K. SPB predictions for this spring and summer.
- L. Public meeting notification.
- M. Scoping notice.
- N. Letter from Forest Supervisor to Incident Commanders
- O. Letter from Forest Supervisor to persons working on emergency response
- P. State Historic Preservation Officer concurrence

News update from . . .

## Congressman Jim Turner

1508 Longworth, Washington D.C. 20515

Fax: (202) 225-5955

For immediate release: March 10, 1998

Contact: Kevin McHargue, (202) 226-8569

### Turner clears path for salvaging downed trees

WASHINGTON — The U.S. Forest Service has been authorized to proceed immediately with salvage of the 270 million board feet of timber left on the ground by high wind storms that swept through East Texas last month, Congressman Jim Turner announced today.

The environmental regulations standing in the way of the salvage were waived by the Council on Environmental Quality in Washington, D.C. Congressman Turner, who enlisted the assistance of Vice President Al Gore to obtain the waivers, said the decision represented a victory for "common sense over strict regulation."

"If the Forest Service had been required to go through the usual procedures, including the filing of an environmental impact statement, that timber would have stayed on the ground until it rotted," Congressman Turner said. "The timber on the ground is enough to build 25,000 homes. Failure to salvage it in a timely fashion would have resulted in the loss of an estimated \$30 million to the taxpayers."

In his discussions with Vice President Gore, Congressman Turner explained the reasons for moving quickly. "I told the Vice President that salvaging this timber would yield about \$30 million, of which 25% goes to counties and school districts in East Texas. If we had waited too long, the Forest Service would have had to spend an estimated \$25 million, which is more than its annual budget for operations in Texas, just to clean it up."

Congressman Turner thanked Vice President Gore for helping clear the way for the Forest Service to begin the salvage operation. "The Vice President saw how important this was for East Texas, and he worked very hard on our behalf," Congressman Turner said.



Congressman Turner said he would continue working to help communities in East Texas recover from the effects of the storms. Shelby County was recently declared eligible for disaster assistance from the Small Business Administration, and several other counties in East Texas are still being evaluated by state and federal agencies.

“We will do everything we can to help families and businesses throughout East Texas recover from their losses,” Congressman Turner said.

The Forest Service plans to advertise for bids this Friday and will hold the first bid opening next week. Interested bidders should contact the Forest Service office in Lufkin.



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
WASHINGTON, D.C. 20503

March 10, 1998

Mr. Robert C. Joslin  
Deputy Chief, National Forest System  
Forest Service  
Auditors' Building, 3rd Floor  
201 14th Street, S.W.  
Washington, D.C. 20250

Dear Mr. Joslin:

I am writing in response to your request of March 4, 1998, requesting alternative arrangements for compliance with the National Environmental Policy Act (NEPA) in consultation with the Council on Environmental Quality (CEQ) under 40 C.F.R. §1506.11 for an emergency situation caused by a windstorm that swept through the National Forests and Grasslands in Texas (NFGT) on February 10th. The windstorm caused a considerable amount of damage on 103,000 acres of forested land on the NFGT, causing severe damage to the ecosystem, including destruction of habitat for red-cockaded woodpeckers and bald eagles. The volume of fallen timber resulting from the windstorm has also given rise to serious concern about high risk of high intensity wildland fires, with potential for further habitat destruction and risk to adjacent private property, and about possible bark beetle infestation.

The Forest Service notified CEQ in late February that it faced an emergency situation that it believed would warrant alternative arrangements for NEPA. At that time, Forest Service personnel were proceeding to remove fallen and hazardous trees from roadways and to implement actions associated directly with red-cockaded woodpecker active clusters, and replacement and recruitment stands. The latter activities were implemented in coordination with the U.S. Fish and Wildlife Service (USFWS) which, by letter dated February 18, 1998, notified the Forest Service that failure to take these actions could result in further adverse impacts to the red-cockaded woodpeckers in certain affected areas. In the Forest Service's estimation, none of these activities would normally require preparation of an environmental impact statement (EIS), and CEQ concurs with that conclusion.

In addition to the above activities and directly in response to the windstorm and its effect, the Forest Service also proposes to remove dead, down, and severely root-sprung trees where mortality is expected. No live trees are to be cut unless their removal has been determined to be necessary for worker safety, under standards established by an interdisciplinary team. Further, no trees are to be removed from riparian areas unless an interdisciplinary team recommends removal to prevent damage to aquatic habitat, abate soil erosion, or to restore natural hydrologic regimes.

Recycled Paper

03/10/98 TUE 15:59 FAX 2024560753 CEQ  
 03/10/98 TUE 14:29 FAX 2024566474 CEQ

The Forest Service proposes to remove trees that meet the above criteria on about 22,000 acres of land in areas adjacent to private property or vulnerable to "blowup" fuel loading conditions as soon as possible and to initiate removal trees on a total of approximately 70,000 to 80,000 acres to reduce the risk of bark beetle shortly thereafter. It is for these actions that the Forest Service seeks approval of proposed alternative arrangements.

We have met with representatives of the Forest Service, including the Forest Supervisor, Ronnie Raum, and have reviewed a considerable amount of material you forwarded to us, including additional information requested by CEQ staff. We have also consulted directly with the U.S. Fish and Wildlife Service and the Environmental Protection Agency regarding the proposed actions, and have benefitted from understanding the results of a public meeting held by the Forest Service in San Augustine, Texas, on the evening of March 7, 1998.

Based upon the above consultation and review, CEQ has concluded that the situation presented on the National Forests and Grasslands in Texas constitutes an emergency situation for purposes of compliance with the CEQ NEPA regulations and hereby approves the following alternative arrangements. These are essentially the arrangements proposed by the Forest Service in the scoping notice published by the NFGT on March 4, 1998, with some modifications taking into account events and discussions that have occurred since that date.

1. The Forest Service will prepare an environmental assessment (EA), in lieu of an environmental impact statement, for the proposed tree removal for bark beetle risk reduction, and include in the EA a discussion of the cumulative effects of the proposed tree removal for bark beetle risk reduction along with the removal of trees to reduce fuel loading concerns. The scoping process has already been initiated by the Forest Service, including the public meeting held on March 7th in Texas. The Forest Service has proposed providing for the normal thirty day comment period for a draft EA before issuing a Decision Notice.
2. The Forest Service will limit the removal of trees to those already down, dead, or severely root-sprung such that mortality is highly probable, and will avoid the cutting of undamaged live trees except for instances of worker safety as indicated earlier in this letter. Tree removal from riparian areas is to be avoided unless removal is recommended by the fisheries biologist, soil scientists, and hydrologist, who are members of the interdisciplinary team, for the purpose of preventing damage to fisheries habitat, abating soil erosion, or restoring natural hydrologic regimes. Live tree cuttings must be in accordance with standards established by an interdisciplinary team and approved by the Incident Commander.
3. The Forest Service will utilize an interdisciplinary team to prioritize tree removal areas and identify appropriate removal techniques. Choice of removal techniques will be informed by the degree of ground disturbances, soil types, soil saturation, worker safety, threatened and endangered species, and other factors the team considers appropriate. The team will give special consideration to riparian areas,

03/10/98 TUE 16:00 FAX 2024560753

CEQ

03/10/98 TUE 14:29 FAX 2024566474

CEQ

sensitive soils, red-cockaded woodpecker habitat management areas, unique plant communities, and any other special areas identified. All tree removal actions will be in accordance with the standards and guidelines set forth in the revised Land and Resource Management Plan, along with any additional mitigation deemed necessary by the team.

4. The Forest Service has already conducted a public meeting in San Augustine, Texas, regarding the proposed action and these alternative arrangements. The Forest Service will proceed to develop and implement a longer-term public involvement strategy that encourages input from the public and in keeps the public informed of progress in implementing the proposed actions.
5. The Forest Service has already consulted with a number of other federal and state agencies in the course of responding to the immediate needs for tree removal and actions needed to mitigate destruction in red-cockaded woodpecker areas. The U.S. Fish and Wildlife Service has temporarily assigned a staff person to the Forest for informal emergency consultation, and has initiated formal consultation under Section 7 of the Endangered Species Act (ESA). The Texas Parks and Wildlife Department has assessed impacts to bald eagles and is assisting with red-cockaded woodpecker consultation. The Forest Service will not proceed with the proposed actions prior to completion of that consultation under ESA.

The Forest Service is acting in accord with a Memorandum of Understanding (MOU) previously entered into between the NFGT and the Texas State Historic Preservation Office. The MOU addresses heritage resource inventory and antiquities law compliance resulting from catastrophic events.

The Texas Forest Service and the NFGT are coordinating joint agency response to the fire danger.

6. The Forest Service will maintain a record that documents the rationale that leads to tree removal priorities, removal technique selection, and mitigation measures that are in addition to the revised Land and Resource Management Plan standards and guidelines. The record be available for review by members of the public.
7. The Forest Service will establish an on-site monitoring team of resource management specialists to ensure quality resource management, document environmental effects and assist in preventing significant adverse effects from occurring. The monitoring team may include personnel from other agencies and will review: (1) compliance with the removal technique decisions; (2) implementation of applicable revised Land and Resource Management Plan standards and guidelines; (3) implementation of additional mitigation measures required by the interdisciplinary team, and (4) promptly inform the NFGT Forest Supervisor of any significant adverse environmental effects noted as the result of actions being taken under these arrangements. Upon notification under provision

03/10/88 TUE 16:00 FAX 2024560753

CEQ

03/10/88 TUE 14:30 FAX 2024566474

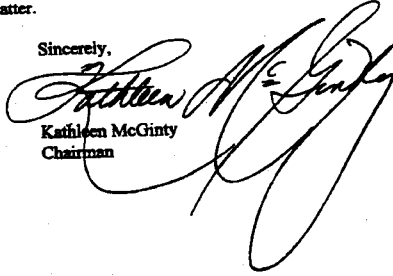
CEQ

(4), the NFGT Forest Supervisor will take appropriate actions to reduce significant adverse effects, including termination of tree removal activities, to reduce or abate those significant effects. The team will also develop recommendations for a longer-term monitoring plan.

8. The Forest Service will notify CEQ expeditiously should the need to modify any of the above arrangements arise, including changed circumstances on the NFGT and/or a determination that the removal actions are causing significant adverse environmental effect. The Forest Service will also provide CEQ with regular progress reports at critical points in the implementation of the actions, but in any event, no less frequently than every three months. The Forest Service will notify CEQ upon completion of the actions taken under these arrangements, and provide information regarding the effects of these actions as understood at that time and regarding the Forest Service's plan to commence the normal NEPA process for reforestation and other restoration activities.

I commend you and the involved regional and NFGT Forest Service personnel for their energy and creativity in responding to the February windstorm and hope that the steps outlined above will enable the Forest Service's response to be as effective as possible. Please do not hesitate to contact me or Dinah Bear, CEQ General Counsel, if we can be of further assistance in this matter.

Sincerely,

  
Kathleen McGinty  
Chairman

KAM/rsk



United States  
Department of  
Agriculture

Forest  
Service

Washington  
Office

14th & Independence SW  
P. O. Box 96090  
Washington, DC 20090-6090

File Code: 1570  
Route To: 1950

Date: MAR 16 1998

Subject: Implementation of Projects Granted Alternative Arrangements

To: Regional Forester, R-8  
Forest Supervisor, National Forests and Grasslands in Texas


On Tuesday, March 10, 1998, the Council on Environmental Quality (CEQ) granted alternative arrangements for the emergency actions requested by National Forests and Grasslands in Texas for rehabilitation of the February 10 windstorm damage.

It is our determination that the agency's appeal rules at 36 CFR 215 do not apply for emergency actions when alternative arrangements are made with CEQ because such actions are outside the scope of our normal National Environmental Policy Act (NEPA) procedures. As acknowledged by CEQ, treatment to those acres is necessary to mitigate damage to endangered red-cockaded woodpecker and bald eagle habitat. These actions are also necessary to reduce the threat of wildfire to human health and safety. Therefore, all your short-term actions listed in your request under Priorities 1 through 3 are to proceed without appeal opportunity.

For the Priority 4 areas, an environmental assessment will be prepared, as agreed to by CEQ. The environmental assessment will be subject to the 36 CFR 215 notice, comment, and appeals process. Because of the urgent need to protect endangered species habitat, I have determined that an emergency situation exists. Therefore, pursuant to 36 CFR 215.10(d)(1), I hereby grant you an exemption from stay of activity otherwise required by 36 CFR 215.10(a) and (b) for all projects related to this environmental assessment. You will need to notify your public that the Forest Service will handle this project as an emergency.

All further NEPA analysis work necessary to determine what actions will be taken to reforest and restore the acreage damaged by the windstorm which are not part of your alternative arrangements request will follow our normal 36 CFR 215 notice, comment, and appeals process unless new conditions arise and you submit a revised request for consideration.

If you have any questions concerning this letter, please contact Susan Yonts-Shepard, at (202) 205-1519 or syontssh/wo (IBM) or susan.yontsshepard/wo:fs (DG).

  
ROBERT C. JOSLIN  
Deputy Chief, NFS



Caring for the Land and Serving People

Printed on Recycled Paper

**DECISION NOTICE**

**Angelina, Sabine and Sam Houston National Forests  
National Forests and Grasslands in Texas  
Angelina, Sabine, San Augustine, San Jacinto, Shelby and Walker Counties Texas  
USDA-Forest Service, Region 8**

**Tree Removal from the February 10, 1998 Windstorm**

An environmental assessment (EA) dated June 1998 is available for public review in the Supervisor's Office of the National Forests and Grasslands in Texas and Angelina National Forest District Ranger's office in Lufkin, Texas, the Sabine National Forest Ranger District office in Hemphill, Texas, and the Sam Houston National Forest Ranger District office in New Waverly, Texas. This document, prepared by an interdisciplinary team, analyzes three alternative tree removal strategies to improve the opportunity to detect, ground check and if needed, take action to suppress bark beetle attacks. The document also analyzes the need to remove trees in the impacted area to further reduce the potential for high intensity wildfires that might occur on the affected national forests that might threaten private property, as well as improve firefighter safety and fire equipment access. Also analyzed is the impact tree removal strategies may have on further damage to threatened and endangered species habitat, particularly red-cockaded woodpecker (RCW).

Because of the scale of the proposed action and the potential significant environmental effects of those actions, I normally would have commissioned the development of an environmental impact statement (EIS). Because of my personal knowledge of adverse significant impacts to RCW resulting from past windstorm responses that did not remove sufficient numbers of downed and deadened trees, I realized that time was of the essence if the NFGT was to utilize cost-effective methods for removing the downed and dead trees. Therefore, at my urging, the Deputy Chief for Natural Resources of the USDA-Forest Service requested and was granted "alternative arrangements" for National Environmental Policy Act (NEPA) compliance by the Council on Environmental Quality (CEQ). Alternative arrangements are allowed by 40 CFR 1506.11. Included as an element within the approved CEQ alternative arrangements was the preparation of an environmental assessment to analyze tree removal to avoid further forest resource and TES habitat damage in lieu of an EIS.

This EA satisfies the agreement between the CEQ and the USDA-Forest Service for alternative NEPA compliance.

**Decision:**

Based on the results of the analysis documented in the EA, my personal observations of the damage caused by the windstorm and my personal consideration of concerns raised by interested publics, I have decided to implement Alternative 3 as modified below:

- 1) Initiate tree removal of dead, down and severely root-sprung trees in all remaining moderately damaged areas that are not scheduled for removal under the criteria for Priority 2 and Priority 3 removal actions.

2) Limit tree removal of dead, down and severely root-sprung trees in lightly damaged areas to a) those lightly damaged acres that are intermixed with or adjacent to extensively and moderately damaged areas scheduled for removal in accordance with interdisciplinary team decisions to satisfy Priority 2, 3 and 4 removal actions, b) those lightly damaged areas that are within Management Area 2 (RCW Habitat Management Area), emphasizing inactive RCW clusters, recruitment and replacement stands, and c) those lightly damaged areas that are within developed or heavily used dispersed recreation areas;

3) Allow tree removal from designated riparian areas only if a hydrologist determines removal of trees downed by the February windstorm is necessary to restore natural hydrologic regimes to prevent flooding to private properties or public roadways, concurrence by a fisheries biologist and soil scientist is required in accordance with CEQ alternative arrangements.

4) Do not allow tree removal from MA8 without further NEPA analysis that determines tree removal is necessary to provide critical RCW habitat or protection for cultural heritage areas.

5) Treat fine fuels within active RCW clusters, along roadways open to public travel, and along common Forest Service-private property boundaries.

The actions permitted by this decision most likely will occur this summer. As modified, Alternative 3 will not exceed tree removal on 9,500 acres of the three affected national forests. The Priority 4 acres are in addition to the trees removed in accordance with Priority 2 and 3.

#### **Reasons for the Decision:**

Alternative 3, as modified above and in accordance with the mitigation methods listed for the proposed action is selected for the following reasons:

1) Although based on the scientific evidence provided by the IDT that tree removal would not decrease the risk of infestation by bark beetle (particularly Southern Pine Beetle (SPB)). Tree removal would allow the timely ground detection and assessment of bark beetle infestations and allow all bark beetle suppression methods, including cut-and-remove, to be employed to reduce further risks to RCW habitat and possible spread on to private property.

2) Moderately damaged areas not treated in accordance with Priority 2 or 3, and lightly damaged areas intermixed with or adjacent to extensively and/or moderately damaged areas are a significant hazard to firefighter safety and can contribute to high intensity wildfires. Concentrations of above-normal fuel loadings in the extensive, moderate and intermixed or adjacent lightly damaged areas create an area where firefighters cannot use conventional firefighting equipment for direct attack strategies. Indirect attack strategies can result in increased fire size, creating greater firefighter risks and threats to private property. The Upland Island Wilderness fire of 1996 on the Angelina National Forest is testament to the fire effects that could be expected when conventional fire suppression equipment cannot be used for direct fire suppression attack. Below normal rainfalls and above-average temperatures have created extreme wildfire danger in much of Texas, including the areas affected by the windstorm. On June 9, 1998, the Governor of Texas announced an emergency proclamation for the extreme danger and requested federal assistance to augment the state's firefighting capability.



3) Failure to remove trees from areas damaged within MA2 can foreclose future prescribed fire treatments that are essential for maintaining critical RCW habitat. Large woody debris (tree boles) left on the forest floor can contribute to smoke management problems which could result in significantly reduced use of prescribed fire. U.S. Forest Service and U. S. Fish and Wildlife Service biologists contribute a RCW population decline on the Francis Marion National Forest in South Carolina to reduced prescribe fire use caused by smoke management problems resulting from large woody debris downed by Hurricane Hugo. U. S. Fish and Wildlife Service biologists are not only in agreement with the tree removal, but have urged me to move quickly to remove the downed trees.

4) This decision better responds to some public concerns by significantly reducing the acreage where tree removal will occur, ensuring water quality safeguards by not removing trees from within at least 100 feet either side of perennial and intermittent streams (except where downed trees will cause flooding problems on private property or public roadways), and not removing downed trees from designated scenic areas while addressing other public concerns that urge removal of all downed trees.

#### Other Alternatives Considered:

Alternative 1 (No Action) - No tree removal would occur in moderately and lightly damaged areas not treated in accordance with Priorities 2 and 3.

Alternative 2 (Preferred Alternative) - Tree removal would occur on approximately 36,000 acres of moderately and lightly damaged areas not treated in accordance with Priorities 2 and 3.

#### Public Involvement:

An Interdisciplinary Team (ID Team) made up of U. S. Forest Service (USFS) personnel met in February of 1998, following the storm, to begin the scoping process. On March 4, 1998, a scoping letter was sent to potentially interested or affected parties outlining the proposed action(s) and requesting comments or issues. This scoping letter noted that the Chief of the Forest Service was being requested to grant an exemption from stay of appeal to the final decision because time is of the essence in initiating the proposed action(s). This exemption was permitted on March 16, 1998, through a determination of an emergency as per 36 CFR 215.10(d). Also, on March 7, 1998, a public meeting was held in San Augustine, Texas to inform the public of the extent of the storm damage on the three national forests. Attendees were given the opportunity to ask questions and provide input on concerns they were having over the windstorm damage. Ten comment letters were received following the public meeting. Copies of the scoping letters and responses addressing the scoping comments are attached to the final environmental assessment (Appendix C).

The ID Team has met to discuss issues, and also to consider agency concerns. The ID Team categorized issues as either significant to the proposal or not significant to the proposal. The analysis in the EA concentrates on the significant environmental issues related to the proposed action.

A draft EA was mailed to interested and affected agencies, organizations, and individuals on March 12, 1998, and the legal notice was published in the Lufkin Daily News on March 14, 1998, initiating the 30 day comment period. It was also listed in the April 1 - June 31, 1998 Schedule of Proposed Actions, under the Supervisor's Office NEPA #00-98-001. Eight comment letters were received through this process. Copies of these letters and responses are also found in Appendix C.

The following issues are considered to be central to this proposal.

1. Heavy equipment used for removal activities, such as road construction and temporary road construction, might cause erosion to occur, thus destroying soil properties and soil productivity.
2. Removal activities within Management Area 4 (MA4) could wash silt into the streamcourses increasing normal levels of sedimentation and decreasing water quality.
3. Removal activities might have detrimental effects on the structure and function of riparian areas within MA4.
4. If trees damaged by the storm are not removed, ground-checking and treatment of SPB infestations would be delayed, resulting in increase in tree losses. Cut-and-remove, the most effective treatment, would be difficult to implement, as necessary equipment could not reach the infestations. RCW foraging habitat, already impacted by the storm, may lose more trees due to delays in infestation ground detection and the use of less effective treatment methods in some instances.
5. Tree harvesting equipment used in removal activities may interfere with seasonal nesting activities of RCW and bald eagles.
6. If windstorm debris is not removed along Forest Service/private ownership boundaries, there would be an increased risk of both wildfires and bark beetle infestation to private ownership.
7. Large amounts of timber available for removal within a short span, could have negative effects on local timber prices. This in turn would affect the 25% returns the counties receive from timber receipts.
8. Removal activities may cause damage to residual trees, especially hardwoods.
9. Removal activities within the special management areas could alter the present condition and long term desired future condition.

See Appendix C of the environmental assessment for responses to the various comments received during scoping.

One comment that has not been responded to in the environmental assessment but deserves special attention is the request to define a healthy forest. The following definition and explanation represents my personal thoughts and does not constitute the agency's official definition of a healthy forest.

For the National Forests and Grasslands in Texas (NFGT), I personally believe a healthy forest will occur when we have achieved the Desired Future Conditions for all management areas as described in the 1996 Revised Land and Resource Management Plan (RLRMP) for the NFGT. Significant public involvement efforts shaped the RLRMP and as such, that plan best represents the goals, objectives and desired future conditions that many people have for their public forests in Texas. The variety of management areas, each with its own unique set of desired future conditions, dedicates various portions of these forests to satisfy the goods, services and values demanded by the public. The forest mosaic that

will be created by those desired future conditions responds to the different values that people hold for their forests.

#### **Finding Of No Significant Impact**

Normally, a Forest Service Decision Notice for a project includes a Finding Of No Significant Impact (FONSI). However, soon after assessing the damage to the national forests created by the February 10, 1998 windstorm, I realized that the magnitude of the efforts needed to respond to the blowdown could potentially significantly affect the quality of the human environment. Unfortunately, time was of the essence to begin emergency responses and development of an environmental impact statement would not allow those emergency actions to occur in a timely manner. Therefore, through the Deputy Chief for Natural Resources, I sought approval from the Council on Environmental Quality to enter into alternative arrangements for compliance with the National Environmental Policy Act. The CEQ did grant alternative arrangements that included preparing this environmental assessment in lieu of an environmental impact statement. Therefore, this decision does not include a FONSI. I do recognize that significant beneficial impacts, particularly for RCW and public safety, may result by implementing this decision and I have carefully considered all disclosed effects in reaching this decision.

#### **Findings Required by Other Laws**

The actions of Alternative 3 are consistent with the RLRMP, the SPB EIS, and the Final Environmental Impact Statement for the Management of the Red-cockaded Woodpecker and its Habitat on the National Forests in the Southern Region, (RCW EIS), ROD dated June 21, 1995.

1. The actions of the project are consistent with the management objectives for each Management Area, as described in Chapter IV of the RLRMP.
2. The actions in Alternative 3 are consistent with the RLRMP because mitigation measures required are fully incorporated in the planned actions. The project is feasible and reasonable, and it results in applying management practices that meet the RLRMP's overall direction of protecting the environment while producing goods and services.
3. The actions of this project which alter vegetation comply with the seven requirements of 36 CFR 219.27(b) by following the Forest-wide standards and guidelines (S&G), the S&Gs for each management area where action may be taken, and special project mitigation measures outlined in the environmental assessment.
4. For water quality management, State-approved Best Management Practices (BMPs) will be used for this project. These BMPs are from the State water quality management plan, and have been designed with the goal of producing water that meets state water quality standards. The project will be monitored to ensure BMPs are implemented. If implementing BMPs on a specific site results in effects significantly higher than anticipated, because of unforeseen site factors or events, appropriate corrective measures will be considered and implemented. This project will fully comply with State approved BMPs and the Clean Water Act [40 CFR 1508.27(b)(10)]. In addition, no tree removal except that needed to avoid flooding of private property or public roadways will be allowed, further assuring CWA compliance.

**Implementation Date**

This decision may be implemented immediately after publishing the notice of decision in the Lufkin Daily News. The project is not subject to stay because the Deputy Chief has determined that because of the urgent need to protect endangered species habitat, an emergency situation exists with respect to the decision in accordance with 36 CFR 215.10(d)(1).

**Administrative Review**

This decision is subject to appeal pursuant to 36 CFR 215.7. A written Notice of Appeal must be postmarked or received within 45 days after the date notice is published in the Lufkin Daily News, Lufkin, Texas. The Notice of Appeal should be sent to USDA, Forest Service, Southern Region, Attn: Appeals Deciding Officer, 1720 Peachtree Road, NW, Suite 816 N. Atlanta, GA 30367-9102.

Appeals must meet content requirements of 36 CFR 215.14. For further information on this decision, contact Bill Bartush by telephone at 409-639-8620, or at Homer Garrison Federal Building, 701 N. First Street, Lufkin, TX 75901.

For additional information concerning the Forest Service appeal process, contact George Weick, Homer Garrison Federal Building, 701 N. First Street, Lufkin, TX 75901 or telephone number (409) 639-8572.



RONNIE RAUM  
Forest Supervisor

DATE: 6/16/98

United States Department of Agriculture	Forest Service	National Forests and Grasslands in Texas	701 N. 1st Street Lufkin, TX 75901 Phone 409-639-8501 TDD # 409-639-8560
---	-------------------	--	---

---

File Code: 1570/1950

Date: June 30, 1998

Kathleen McGinty, Chairman  
Council on Environmental Quality  
Executive Office of the President  
Washington, D.C. 20503

Attn: Dinah Bear

Dear Ms. Bear:

On behalf of Deputy Chief for the National Forest System Robert C. Joslin,  
attached is our 3-month report in accordance with the alternative  
arrangements approved for the National Forests and Grasslands in Texas (NFGT)  
following the February wind storm that damaged 103,000 acres of NFGT land in  
East Texas.

Sincerely,



RONNIE RAUN  
Forest Supervisor

Enclosure

cc: Regional Forester, R-8

NFS  
FM  
C. Holmer  
R. Solomon

avoided unless removal is recommended by the fisheries biologist, soil scientists, and hydrologist, who are members of the interdisciplinary team, for the purpose of preventing damage to fisheries habitat, abating soil erosion, or restoring natural hydrologic regimes. Live tree cuttings must be in accordance with standards established by an interdisciplinary team and approved by the Incident Commander."

**NFGT Response:**

The NFGT has avoided the cutting of undamaged live trees such that minimal numbers of live trees have had to be cut. Many of the trees cut have been removed based on worker safety needs. Most cut trees were severely leaning due to storm damage or trees in which other windthrown trees were lodged. Both scenarios pose severe threats to worker safety. This is especially true in helicopter tree removal areas where rotor wash can easily topple trees not firmly rooted.

A few live trees have been cut due to tree removal operations required to meet incident objectives. These trees are known as "bump" or "rub" trees. "Bump" trees are used along skidder trails to turn trees onto developed skid trails. The trees being moved are "bumped" into a particular tree to turn corners. Use of "bump" trees provides for safer operations and prevents damage to a greater number of trees. Damage to more trees is prevented because movement paths and bumps are concentrated to a few trees instead of scattered to many trees. When skidding operations are complete in an area, these "bump" trees are inspected for damage. Trees that have received damage greater than one-third of the tree's circumference, may be designated to be cut and removed. See Appendix A for documentation of the interdisciplinary process and criteria used for "bump" tree designation and removal.

Although allowed by the agreed-upon alternative arrangements, the team of a fisheries biologist, soil scientist, and hydrologist has recommended tree removal from within only one designated riparian area of the approximately 210 miles delineated. The team determined that an extensively damaged riparian area adjoining private property needed tree removal to restore the natural hydrologic regime to avoid flooding of upstream private property and a state highway bridge structure.

A few instances of trees inadvertently being removed from within designated riparian areas have been observed through sale administration and monitoring efforts. Most instances were due to contractor error. Instances have been reviewed for environmental effects, and no significant effects were observed. Contract actions have occurred, including temporary shut-down of removal operations, to prevent further removal of trees within designated riparian areas.

**CEQ Element 3:**

"The Forest Service will utilize an interdisciplinary team to prioritize tree removal areas and identify appropriate removal techniques. Choice of removal techniques will be informed by the degree of ground disturbances, soil types, soil saturation, worker safety, threatened and endangered species, and other

from the public and keeping the public informed of progress in implementing the proposed actions for this incident. The Strategy documents initial response actions and the long-term action plan. Appendix F of the Strategy contains a Status Report which is updated periodically.

Highlights of the Strategy implementation include:

Weekly updates, initiated April 3, 1998, are sent to the NFOT NEPA mailing list, interested individuals, congressional delegates, local and state officials, Forest Service offices, partners, general public, and other federal agencies.

Pro-active media contacts have occurred through visits, telephone calls, news releases, news advisories, and public service announcements. Media tours have been provided, and multiple media tours were conducted during the initial helicopter tree removal operations. As of June 10, 1998 approximately 100 news articles and editorials have been clipped for documentation files.

Contacts with other government agencies, external organizations, and individuals are documented with contact forms.

Storm-damage information has been added to the NFOT Internet web site and is updated frequently. The NFOT Internet address is:  
<http://www.r8web.com/texas>.

NFOT and incident personnel have presented numerous programs to various groups such as schools, Kiwanis, Lions, and Rotary Clubs, Society of American Foresters, Stephen F. Austin University students, and local Chamber of Commerces.

Community outreach is accomplished through informational bulletins which are posted at 24 local businesses and bulletin boards. Incident Information Officers are available to assist the public as needed. Helicopter tree removal viewing was offered with interpretive and educational opportunities for the general public and students from grade school through graduate school. Forest Service personnel explained helicopter capabilities and reasons for helicopter use, red-cockaded woodpecker and bark beetle information. Viewings were offered for 11 days, and approximately 2,250 people attended.

Forest Service Chief Mike Dombeck and CEQ General Counsel Dinah Bear toured the storm-damaged areas of the Angelina and Sabine National Forests May 11 and 12, 1998.

On May 16, 1998, the Forest Supervisor and Sam Houston National Forest personnel met on the Sam Houston National Forest to view damaged areas and discuss blowdown responses with representatives of the Houston Regional Group of the Sierra Club and the Texas Committee on Natural Resources (a grassroots environmental organization).

Coordination also continues with Texas Forest Service (TFS) in a joint agency response to the fire danger. The NFOT and TFS have joined forces to warn the public of fire danger through public service announcements, news releases, and media interviews. In a cooperative effort, the agencies have charted a joint Storm Damage Fire Prevention Action Plan for 1998. TFS has provided additional people and equipment to the incident, and arrangements have been made for sharing fire suppression resources. This MOU is also provided in Appendix D.

CEQ Element 6:

"The Forest Service will maintain a record that documents the rationale that leads to tree removal priorities, removal technique selection, and mitigation measures that are in addition to the revised Land and Resource Management Plan standards and guidelines. The record will be available for review by members of the public."

NFOT Response:

A documentation unit leader was assigned to the emergency response operations in late February with responsibility for compiling and cataloging all non-contractual documents pertaining to the tree removal operations. Documents collected in the documentation unit through June 10 exceeded five drawers of letter-size filing cabinets. These documents include, but are not limited to, storm-damage assessments, interagency correspondence related to the incident, delegations of authority to Incident Commanders, correspondence with other agencies, pre-sale resource assessments, IDT recommendations for the removal priorities and techniques, Incident Commander and Forest Supervisor decisions related to the incident, press releases, newspaper clippings, legal notices, resource monitoring reports, fuels assessments, as well as briefing materials provided to higher Forest Service organizational levels and the CEQ.

The NFOT is also maintaining a complete set of documents related to sale contracts for sale and removal of the dead, down, and severely root-sprung trees. These contractual documents include, but are not necessarily limited to, acreage and volume estimates, sale prospectuses, awarded contracts including sale-by-sale mitigation measures, appraisals to determine minimally acceptable bid prices, and sale administration inspection reports.

The NFOT has shared various storm response related documents internally and with other federal and state agencies. In addition, the NFOT has provided documents asked for by the public through several Freedom of Information Act (FOIA) requests. For one FOIA request that lacked specific information identification, the NFOT offered an individual the opportunity to personally view all the incident records.

Timber Sale Contracts for sales #4 and #11, discussed in NFOT Response to CEQ Element 3, are provided in Appendix E.



found numerous previously unknown prehistoric sites that will add to the inventory of cultural resources. Archeologists are also using the information gathered from the storm response to analyze the need to remove larger, older trees from known significant cultural sites to prevent site degradation from future wind storm events.

Longer-term monitoring of the storm response has begun. Stephen F. Austin State University (SFA) professor Dr. Jack McCullough has begun water quality monitoring to determine effects associated with tree removal as well as effects from not removing downed trees within riparian areas. Several SFA forestry students are conducting site-specific vegetation inventories of harvested areas that will be used by the reforestation interdisciplinary team to analyze reforestation/restoration options and then monitor effects of reforestation efforts.

The NFGT is developing an additional monitoring plan to guide the longer-term monitoring opportunities. Further RGW population changes and characterization of forest stands due to wind storm damage and reforestation efforts are being considered.

CEQ Element 8:

"The Forest Service will notify CEQ expeditiously should the need to modify any of the above arrangements arise, including changed circumstances on the NFGT and/or a determination that the removal actions are causing significant adverse environmental effect. The Forest Service will also provide CEQ with regular progress reports at critical points in the implementation of the actions, but in any event, no less frequently than every 3 months. The Forest Service will notify CEQ upon completion of the actions taken under these arrangements, and provide information regarding the effects of these actions as understood at that time and regarding the Forest Service's plan to commence the normal NEPA process for reforestation and other restoration activities."

NFGT Response:

The NFGT has provided a dozen weekly updates of the storm response. These weekly updates will continue through June and then as new tree removal authorizations decrease, updates will occur every two weeks.

Only one modification to the original CEQ-granted alternative arrangements has occurred. In agreement with USFWS, the NFGT has remained in emergency consultation of the storm response to comply with Section 7 consultation requirements of the Endangered Species Act rather than entering formal consultation processes. CEQ agreed in writing with this approach.

This report formally documents storm response efforts for the period March 10, 1998 to June 10, 1998.

Priority 3

"Reduce increased fuel loadings created by the mass of fallen trees and tops to avoid potential catastrophic fires. This action would be taken in areas that adjoin private property or where extensive damage has created a potential 'blowup' fuel loading condition.

Fuel reduction efforts must begin immediately as the East Texas spring and summer fire season is rapidly approaching. Many private citizens have begun to burn storm debris and any escaped fires from debris burning pose a serious threat to other private property, RCW and bald eagle habitat, and firefighter safety. Approximately 22,000 acres require this action."

## NFCT Accomplishment Status

Using salvage sale authority, the NFCT has awarded contracts for approximately 18,174 acres of tree removal to meet the Priority 3 objective. Twenty-seven sale contracts, including five utilizing helicopter harvesting methods, have been awarded. Additional Priority 3 sales will be awarded with removal scheduled to be completed by late summer.

Priority 4

"Reduce the risk of bark beetle attack on remaining live trees. Downed and damaged trees provide suitable host material for bark beetles, especially between April and October. The storm damage therefore could lead to an increase in the number of infestations on public and private lands, threatening RCW and bald eagle habitat as well as other forest resource values. Downed and broken trees are subject to attack by pine engraver (Ips) beetles. Action should be initiated by April 1, 1998. Approximately 70,000 to 80,000 acres require this action."

## NFCT Accomplishment Status

The EA that analyzes the appropriate Priority 4 action has been reviewed, and the Decision Notice that determines what action will be taken will be signed June 16, 1998. The predecisional EA proposed action called for Priority 4 tree removal on 70-80,000 acres. The preferred alternative in the final EA would remove trees on approximately 36,000 acres. However, the Priority 4 decision will limit additional tree removal to no more than 9,500 acres of moderately and lightly damaged areas. The Forest Supervisor is basing this decision on scientific data concerning bark beetle incidence, firefighter safety and equipment access, personal observations of storm damage, and concern for significant issues raised by the commenting public.

**Eagle Nesting Success**

In storm-damaged areas of the Sabine, two active bald eagle nests were found. Three young eagles were produced, and by May 1, 1998, both nests were vacant with immature eagles free flying.

In an area impacted by light storm damage in the Angelina, one eagle was fledged.

Botanists have documented 201 sensitive plant sites containing 15 species of TES plants. Three are listed as "Regional" sensitive, with the remaining listed as "Forest" sensitive. Approximately 10 percent of the sites have been located with the Global Positioning System (GPS).

Coordination is taking place to survey and monument exemplary natural plant communities identified by Texas Natural Heritage Program (TNHP).

One hundred and fifty-nine archeological sites and 13 historic cemeteries have been revisited and assessed for damage, and their locations verified with GPS. Eight new sites, both historic and pre-historic, have been discovered, documented, and located with GPS. Two Civilian Conservation Corps Camps have had their boundaries located with GPS.

Estimated person-hours dedicated to storm response monitoring include:

Soil and water monitoring	30,000 hours
RCW and Bald Eagle monitoring and protection	5,000 hours
TES plant inventory and monitoring	5,000 hours
Heritage resource monitoring and protection	5,000 hours.



**AMERICAN FOREST & PAPER ASSOCIATION**  
Legal Department

March 31, 1998

**The Honorable Don Young**  
Chairman, Resources Committee  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Young:

The American Forest & Paper Association (AF&PA) submits the following comments for the record of the hearing held on March 18 before the House Resources Committee regarding the National Environmental Policy Act (NEPA). AF&PA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. We represent approximately 130 member companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The association is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies. AF&PA represents an industry which accounts for more than eight percent of total U.S. manufacturing output. It directly employs about 1.4 million people and ranks among the top 10 manufacturing employers in 46 states.

NEPA is designed to provide information to the Federal decisionmaker. As such, it is a procedural law which carries with it no substantive direction for the actual decision. Unfortunately, a combination of factors have resulted in NEPA being more of a roadblock than an aid to decisionmaking. Below, we have set out examples where this has occurred.

#### **Source Area Impacts**

A Federal agency has considerable discretion to define the scope of the impacts from the proposed action, although Federal courts have circumscribed this discretion somewhat by requiring analysis of cumulative and other related impacts, including worst case analysis. In the last few years, the Environmental Protection Agency has advocated use of an even greater expansion of speculative impact analysis by urging agencies to address the impacts caused by unknown third parties who provide raw materials from unspecified locations in a source area to a facility requiring a Federal permit of one type or another, including transportation facilities. In addition, the analysis has resulted in recommendations that the agency impose conditions which would require the permittee to ensure that the activities of the third parties doing business with the permittee, or doing business with other third parties doing business with the permittee, comply with certain mitigation measures.

An example of this occurred in Louisiana where a company seeking to construct a rayon facility applied for an NPDES water quality discharge permit under section 402 of the Clean Water Act. EPA recommended inclusion of permit conditions that would have required the

applicant to purchase logs only from landowners who complied with specific mitigation measures. The company withdrew its application for this and other reasons and dropped the project.

A similar circumstance arose in Tennessee where the Tennessee Valley Authority (TVA) rejected three applications to permit barge facilities to transport wood chips from mills to be constructed nearby. TVA proposed adding the following conditions on the barge facility permits, conditions which the barge facility operator had to ensure were followed by timber harvesting activities in a 42-county area (75-mile radius) on land owned by tens of thousands of landowners which were supplying logs to the chip mills, not the barge facilities:

- ▶ Best management practices (BMPs) must be followed;
- ▶ Pre-harvesting plans must be submitted to the appropriate state agency and U.S./ Fish and Wildlife Service for review at least 30 days before harvesting. If either objects within 30 days, the plan must be modified. The pre-harvesting plan must include:
  - Pre-harvesting site description;
  - BMP's;
  - Harvesting technique(s);
  - Archaeological resources and historic structures; and
  - Anticipated post-harvesting use;
- ▶ No-harvest buffer zones around the mouths of caves, sinkholes, and other karst features;
- ▶ Wetlands, streams, and drainways may not be modified;
- ▶ All federally-listed endangered and threatened species and their critical habitats may not be impacted;
- ▶ All known archaeological sites and historic structures must be avoided;
- ▶ Harvesting on slopes > 50% may not occur unless by cable logging.;
- ▶ Discourage open burning of slash by landowners;
- ▶ Reduce potential visual impacts;
- ▶ TVA would have the right to audit an operator's records to verify compliance with all on-site and source-area mitigation measures.

While many of these conditions are practiced by forestry operators throughout the country, they are not legal requirements which every landowner must follow. Moreover, the U.S. Fish and Wildlife concluded these conditions were not sufficient and demanded additional ones in its biological opinion prepared under the Endangered Species Act. When TVA realized the

magnitude of the work required by both the barge facility operators and TVA to ensure compliance, the agency rejected the applications. EPA and environmental groups continue to agitate for these source area analyses.

#### **Conservation Plans under the Endangered Species Act.**

The experience of our members has been that preparation, negotiation and completion of a habitat conservation plan (HCP) under section 10 of the Endangered Species Act (ESA) is an expensive and time-consuming process. The HCP contains considerable analysis of the species' biology, of the existing environment, of impacts and of alternatives. Then, a portion of this analysis must be repeated in a document to satisfy the National Environmental Policy Act (NEPA), at yet more expense. We certainly do not object to a process that ensures the analysis is complete, but we do object to redundant compliance. Since the Administration has as yet been unable to provide a workable solution to these needless frustrations, we urge the Committee to do so. A legislative solution would likely be the safest course as well since the federal courts tend to view NEPA and ESA compliance in a literal manner.

#### **Forest Planning**

The Forest Service had a difficult time learning to comply with the NEPA. As the Supreme Court ruled in *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332 (1989), NEPA is a procedural statute. However, the penalty for improper procedures is delay, sometimes years of delay. While forest management must think in terms of lengthy tree lifetimes, a few years can have a dramatic effect on the present health of a forest or even the survival of local industry.

Delays are caused both by preparation time as well as by injunction. No one advocates allowing federal agencies to ignore the law. However, there are no standards for issuance of injunctions for failure to follow a NEPA "procedure" properly. Rarely are the economic consequences and forest health problems given much weight in the decision to enjoin. Congress should provide the elements a court should consider and indicate its intent as to the relative weight each element should be given.

The adverse judicial NEPA decisions resulted in analysis of plan alternatives which set out various output levels and harvest methods. However, the one consistent position the Forest Service has followed for the last five years is that plan outputs are not binding and are not decisions. The Forest Service does consider itself bound by the plan standards and guidelines which rarely are subject to alternatives in the plan environmental impact statement (EIS). This creates a huge disjunct between the expectation created by the plan with its accompanying EIS and actual implementation.

The plan and its EIS must identify the true decisions and analyze alternatives to those decisions. We would prefer that alternatives did focus on timber outputs and that actual, binding decisions were made in the plan on minimum volumes that must be offered each year. But the EIS must at least contain alternatives for all decisions that the agency considers binding on its future actions.

The proliferation of EIS preparation on the national forests is staggering. The Forest Service prepares an EIS for the Regional Guide. Then it prepares an EIS for each forest plan. The agency then prepares an EIS for some sales. If an issue of concern to several forests arise, such as the California spotted owl, an EIS is prepared on a new management strategy. The Forest Service personnel who began the plan and its EIS are often gone when the plan is finished and are rarely around for implementation. The Forest Service must be given direction to limit its EIS preparation to plans -- plans which have meaningful decisions -- and then prepare much simpler environmental assessments that rely on the plan EIS as appropriate.

A supplemental problem to the EIS syndrome is its effect on implementation of the existing plan while the new EIS is under preparation. The Forest Service spends several years preparing a forest plan. However, as soon as a new issue is identified, the agency is expected to incorporate the proposed management response in ongoing plan implementation while the issue is being studied and before the plans have been amended. This results in constant turmoil and prevents any consistency of management. This in turn renders monitoring and evaluation difficult if not impossible because the ground rules continually change and the actual effects cannot be measured against the predicted ones.

Given the amount of environmental analysis that goes into forest planning, an EA should usually be sufficient for a timber sale. However, inconsistent judicial decision have caused considerable confusion in this area. A number of courts have held that an EA is sufficient. *Fener v. Hunt*, 971 F. Supp. 1025 (W.D. Va. 1997); *Swanson v. U.S. Forest Service*, 87 F.3d 339 (9th Cir. 1996); *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996); *Sierra Club v. U.S. Forest Service*, 46 F.3d 835 (8th Cir. 1995); *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1111-13 (W.D. Va. 1994), *aff'd without opinion*, 61 F.3d 900 (4th Cir. 1995); *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994). However, several courts have ruled that an environmental impact statement is required. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, \_\_\_ F.3d \_\_\_ (9th Cir. 1998); *Idaho Sporting Congress v. Thomas*, \_\_\_ F.3d \_\_\_ (9th Cir. 1998); *National Audubon Society v. Hoffman*, \_\_\_ F.3d \_\_\_ (1st Cir. 1997); *Curry v. U.S. Forest Service*, Civil No. 97-1081 (W.D. Pa. October 15, 1997). While differences in the quality of the various environmental analyses may occur, there is little guidance in decisions which refer to the number of pages in an environmental assessment as a basis for determining the significance of the proposed sale.

The various NEPA elements are put into stark relief when a fire or windstorm causes substantial damage on a national forest. The dead and dying trees contribute a dangerous fuel load to the forest as well as a breeding ground for various pests, both of which threaten healthy portions of the national forest and adjacent private and state lands. In addition, the relative value of the timber, and thus the chances of actually finding a purchaser, decrease the longer the dead trees remain in the forest. The Administration recognized these factors in the alternative NEPA arrangements which the Council on Environmental Quality recently established pursuant to 40 C.F.R. § 1506.11 for an area of the Texas National Forests affected by a severe windstorm. Unfortunately, this is not always the case.

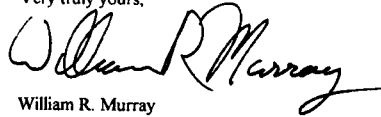
In August 1996, a wild fire swept through nearly 40,000 acres on the Malheur national Forest in Oregon. By October of that year, the Forest Service had begun preparation of an

environmental impact statement for the Summit Fire Recovery Project of 108 million board feet of timber. In December 1997, after completion of the EIS, the Forest Service withdrew the decision to hold the sale and started over. The draft supplemental EIS, which the agency released this month, proposes a sale of 60 million board feet, a sale which would occur in August 1998 at the earliest, two years after the fire. The agency is estimated to have spent over \$1.5 million on this analysis, while the timber loses \$21,000 in value each day, or almost \$4 million every six months. While these delays are not directly caused by the statutory language in NEPA, that statute and its interpretation have set an atmosphere which causes otherwise reasonable people to resort to over-analysis and redundancy.

#### **Conclusion**

Through the years, NEPA has served well the original intent of Congress to ensure that Federal decisionmakers are fully informed before they proceed. Unfortunately, the law has also proven to be a motherlode of delay, red tape and conflicting judicial interpretations. This has resulted in frustration and expense not only to the Federal government but also to those members of the public who depend on timely Federal action. Moreover, NEPA, through the concept of source area analysis, has become the surrogate for those who seek Federal control over all land use activities.

Very truly yours,

A handwritten signature in black ink, reading "William R. Murray". The signature is fluid and cursive, with the first name "William" and last name "Murray" clearly legible.

William R. Murray  
Natural Resources Counsel



**TESTIMONY OF  
JEFFREY L. ZELMS  
PRESIDENT AND CHIEF EXECUTIVE OFFICER  
OF THE DOE RUN RESOURCES CORPORATION**

Mr. Chairman, my name is Jeffrey L. Zelms. I am the President and Chief Executive Officer of The Doe Run Resources Corporation. I am pleased to submit this written statement for the hearing by the Committee on Resources of the House of Representatives on the subject of the implementation of the National Environmental Policy Act ("NEPA") by the federal land management agencies.

Doe Run is well-acquainted with the management policies and practices of the United States Forest Service ("USFS"), and with the USFS implementation of NEPA. We, as The Doe Run Resources Corporation and previously as the St. Joe Minerals Corporation, have drilled literally tens of thousands of exploration coreholes in the Mark Twain National Forest and adjoining lands over the last 40 years. Every year we drill between 150 and 250 exploratory holes on federal government leases and prospecting permits on tracts scattered over a distance of approximately 60 miles. We have also operated several large underground mines continuously since the late 1950's. We have closed and completely reclaimed one mine site, and are currently operating six mines, five of which mine under the National Forest lands.

As a result of our many years of mining operations in the Mark Twain, Doe Run has come to know how the USFS exercises its dual, and sometimes conflicting, responsibilities to promote the multiple use values of Forest System lands while protecting its environmental quality. This is a difficult task and, overall, Doe Run respects the job that the USFS has done to balance these competing duties.

Our general satisfaction with the management of the Mark Twain has, however, been weakened of late by a growing concern over initiatives undertaken at the federal policy level that threaten to seriously impede and, as a practical matter, halt exploration and mining activities on many National Forest System lands. We have detected a clear trend away from multiple use management and in the direction of single purpose preservation of National Forest System lands and resources.

Utilization of National Forest resources for developmental purposes is increasingly becoming more and more difficult to undertake as the USFS imposes new procedural requirements making it more burdensome at the field level to obtain permits and authorizations. A similar trend also may be emerging at the policy level of the Department of the Interior as a result of the role the Bureau of Land Management ("BLM") plays in the management of minerals found on National Forest System land. Unless this trend is reversed, we fear that the National Forest System will eventually come more closely to resemble the National Park System. As a result, resources that can be extracted or removed from Forest System lands will become less and less available for manufacturing and other important commodity uses that are essential to our economy and indeed everyday life. In addition, jobs will be lost, local communities harmed economically, and the federal government and the states will be deprived of royalties that they receive from mineral development on National Forest lands.

There are three issues that I will discuss which illustrate this problem. The first is the manner in which USFS policy level decisions involving NEPA have frustrated mineral development on National Forest System lands. The second is an effort by the National Park Service to reach onto National Forest lands and lock up all access to minerals contrary to the policies and multiple use requirements governing such lands. The third is a more recent effort to further burden mineral exploration

with excessive NEPA analysis and procedure, delaying actions on pending applications for prospecting work.

With respect to NEPA, for many years, the USFS treated the short-term exploratory mining activities conducted pursuant to prospecting permits and certain other authorizations as subject to a categorical exclusion from compliance with the NEPA documentation requirements. Such exploratory activities have no adverse environmental consequences, and they are the essential first step toward developing the valuable mineral resources found on Forest System lands. According to the USFS Manual, that categorical exclusion applied to "[m]ineral and energy activities of limited size, duration, and degree of disturbance." This common sense categorical exclusion included the "removal of several mineral samples." 50 Fed. Reg. 26,081. This provision was in effect for at least a decade. It was based on the recognition that most of these exploratory activities result in only minor environmental impacts and should be both approved and conducted expeditiously without undue, time-consuming, and expensive government process.

This categorical exclusion provided an efficient and effective procedure for NEPA compliance that allowed the mineral values of the Mark Twain to be ascertained without adverse environmental effects. As has always been the case with categorical exclusions, for instances where there were extraordinary circumstances indicating potential significant environmental effects, an otherwise excluded action could be more closely examined in an environmental assessment.

In 1991, USFS published proposed changes to its NEPA compliance requirements for public comment. The proposal included a categorical exclusion that would have, in effect, maintained the status quo by establishing a categorical exclusion for:

Proposals to approve mineral and energy activities  
 where there is little potential for soil movement,  
 loss of soil productivity, water and air quality  
 degradation or impacts to sensitive resource values.

56 Fed. Reg. 19,746. The USFS proposal identified the "drilling of several core holes in the area to determine the extent of a mineral deposit" as an example of the activities subject to a categorical exclusion. *Id.* Under this authority, Doe Run's prospecting permit and exploratory drilling activities have been authorized by categorical exclusion.

Without warning, in 1992 USFS abruptly reversed course. Rather than maintain the time-honored approach of allowing these routine exploration and prospecting permit activities to be subject to a categorical exclusion, the USFS came up with a new rule. Now, only "[s]hort-term (one year or less) mineral, energy, or geophysical investigations and their incidental support activities" are covered by the categorical exclusion. Because prospecting permits can be issued for two to six years, it is possible that this language could be read to require time-consuming and expensive NEPA compliance through environmental assessments or environmental impact statements. The practical effect of this requirement is to eliminate all of the benefits that result from the use of categorical exclusions.

If applied strictly, this change could result in major impediments for mining. The development of Forest System minerals starts with exploration. Under this new rule, exploratory work could take years to approve. Clearly, this new requirement will make mineral exploration very difficult, if not impossible, to undertake. Public comment would be required in many cases, and mining opponents would be in a position to challenge even prospecting permit activities through the adversarial USFS

appeals process. The result will be: far less mineral exploration; lengthy, costly and reduced mineral development; and no increase in environmental protection.

Equally troubling is the unresponsive, if not unlawful, procedure the USFS used to make this change. The USFS did not solicit public comment on the change to the categorical exclusion, which was made between the time the NEPA procedures were proposed and the date that they were issued in final. The mining industry was never consulted.

The new rule was, in effect, an attack on the mining industry. Accordingly, Doe Run and several other mining companies complained to the USFS after learning of the change. Congressman Young, Chairman of the House National Resources Committee, expressed his concern in a March 20, 1995, letter to USFS Chief Thomas and asked that the policy not be implemented until a Congressional briefing had occurred. The USFS initially ignored Chairman Young's request and, on March 28, responded to Doe Run and the other companies in a letter simply stating, without explanation, that the new rule would remain in effect.

As a result of continued criticism from Doe Run, other mining companies, and Chairman Young, the USFS agreed to undertake discussions with industry about this problem. These discussions have been very slow. Although the USFS agreed with Doe Run that the new categorical exclusion is too narrow and injures mining, nothing has been done to fix the problem. We have had discussions, but have been discouraged by the lack of progress.

Well over two years ago, the USFS began an effort to revise the categorical exclusions set forth in the Forest Service Handbook. Doe Run has been told that it may be necessary to wait for this process to conclude before the overly restrictive categorical exclusion can be fixed. It may take years for this process to be completed.

Most recently, we are troubled by reports that representatives of environmental groups obtained copies of internal agency working drafts of categorical exclusion changes, and that the process has been further slowed by complaints by these groups to the Administration about various proposed changes, before the proposals have even been made available for public comment.

Mineral exploration should not be forestalled for so long. Expedited procedures are available to fix this problem, including interpreting the new categorical exclusion to allow for prospecting permit activities or to simply revise that categorical exclusion now on a fast track separate from all of the other NEPA changes USFS is considering. Categorical exclusions are a valuable tool to enhance the effectiveness of NEPA implementation, and agencies should be looking to increase, rather than curtail, the list of actions considered to be categorically excluded from compliance with NEPA.

It would be very helpful for this Committee to send a strong signal to USFS that no further action should be taken to weaken the multiple use management dictates of the National Forest System laws through the implementation of unnecessarily burdensome NEPA procedures. In those situations where bad decisions have been made in the past, such as the decision to reject the categorical exclusion rule for prospecting permits, the USFS should be asked to reverse course.

In addition to the procedural problems presented by the USFS' abandonment of its former, common sense use of categorical exclusions, an even greater threat is now looming to multiple use of Mark Twain lands. In 1996, the National Park Service ("NPS") wrote to the USFS requesting that a significant portion of the Mark Twain National Forest be withdrawn from all mining activity. Without environmental justification, public consideration, consultation with affected parties, or compliance

with legal requirements, NPS launched this effort to, in effect, transform these multiple use National Forest System lands into a single purpose preservation zone. Taking such an action would frustrate the obvious intent of Congress to manage these lands for resource utilization, as well as other purposes.

More recently, in a September 18, 1997 letter, the Environmental Protection Agency (EPA) has suggested that a environmental impact statement (EIS) be prepared before issuing prospecting permits for exploratory drilling on the Mark Twain National Forest. The EPA and apparently also the NPS have contended that the possible cumulative impacts of full mine development should be considered in detail at the initial prospecting stage of mineral exploration. This would be entirely speculative at this early stage of determining whether minable deposits are even present in an area and prior to any commitment by the agency or the operator to leasing or mine development. The internal debate among agencies over this issue has substantially delayed decisions by the USFS and BLM on pending Doe Run prospecting permit applications for which a detailed environmental assessment has been prepared.

Requiring an EIS for prospecting activity on the Mark Twain could establish a much farther reaching adverse precedent for requiring cumbersome and pointless EIS preparation for all kinds of minor, low impact mineral exploration and other activities nationwide. The Committee Chairman has already joined other members of Congress in sending a January 14, 1998 letter to the Secretaries of the Interior and Agriculture requesting a briefing regarding this matter. We urge the Committee to obtain assurances from the Administration that NEPA will not be used in this manner to needlessly hinder and delay mineral exploration on the Mark Twain or other activities on public lands managed by federal agencies. Thank you for this opportunity to testify on these matters of great concern to The Doe Run Resources Corporation and the

mining industry. If we may be of further assistance to the Committee, please do not hesitate to contact me.



## Wyoming/Colorado

---

# GREEN RIVER BASIN ADVISORY COMMITTEE

Final Report to the Secretary of the Interior

## NEPA STREAMLINING RECOMMENDATIONS

### Preamble

The primary goal of the Green River Basin Advisory Committee (GRBAC) is to ensure reasonable development of natural gas and oil while protecting environmental and other resource values. An important step toward achieving this goal is to improve NEPA documentation and analysis while reducing delays, uncertainty and increased costs associated with that process. GRBAC's objective is to streamline the NEPA process by 50% reduction of time and paper.

The attached recommendations will help improve the quality of the project NEPA process and documentation while reducing delays, uncertainty and paperwork. The recommendations are tied to each phase of the NEPA process (pre-proposal, scoping, data collection/EIS, EIS, Record of Decision, post-NEPA, monitoring). Key features are:

Submission of conceptual project plans with standard operating practices and preferred mitigation to help resolve issues early, diffuse controversy, reduce environmental impacts and minimize appeals.

Early identification and resolution of critical issues while screening out unproductive time and paperwork spent on peripheral matters and previously resolved issues.

Improving coordination and communication among project proponents, affected agencies and stakeholders to reduce adverse comments and time required for BLM to respond to those comments.

Improvements in the format and content of the NEPA document that will improve its quality while reducing its size.

Eliminating duplication in data requirements as well as consolidating and accessing existing data bases.

Reducing delays caused by BLM budget constraints by using eco-royalty relief as a tool to fill critical data gaps, to monitor mitigation effectiveness, and to explore new and creative ways to further reduce environmental impacts.

These key features are illustrated on the table at the end of this recommendation which shows how NEPA time frames may be reduced. If implemented and committed to by all parties, a 38% reduction in preparation time for an EIS (from 26 to 16 months) is anticipated. Additionally, by early resolution of issues and diffusing controversy, GRBAC members agree that greater use of the Environmental Assessment (EA) rather than the Environmental Impact Statement (EIS) to assess environmental impacts of oil and gas development is expected. Averages time and paper associated with preparing an EIS in the Green River Basin is 26 months and 200 pages. Averages time and paper for an EA within the same area is 8 months and 30 pages. Assuming only 1/3 of the new projects that would in the past be subject to an

EIS could now be handled through an EA, an average additional 40% reduction in time and paper would result.

## **Recommendation for the Pre-Proposal Phase**

### **Improving Proponent Submissions and Proposals**

*These recommendations will shorten the pre-proposal discussions by 1 - 6 weeks.*

Operators should submit a Project Plan that includes standard operating practices and preferred mitigation.

Operators and BLM should have substantive discussions on the operator's preferred mitigation by companies to put issues to rest early on. Resolution of issues does not prevent BLM from addressing mitigation needs that arise during the NEPA process and after.

### **Improving Interagency Coordination**

*These recommendations will shorten the 'approval' process by several months, especially if all federal, state, and local government agencies concurrently review and approve the project. Concerns or objections raised late in the process will be minimized.*

Facilitate and encourage better interagency cooperation early in the NEPA process by:

Identifying all agencies with jurisdiction by law (i.e., permitting, review) over actions.

Conduct NEPA processes concurrently with other planning, approval, and environmental review procedures (i.e., SEA Sec 7 consultation, C.A. Sec 404 permits, NAPA Advisory Council consultation, etc.). Analysis and review should run concurrently, not consecutively.

BLM should hold quarterly (or semiannual), interagency meetings on status of NEPA projects. The purpose of these meetings will be to discuss project objectives, personnel needs, schedules, provide updates on progress, etc. These meetings should be held only when necessary and when they will not delay ongoing projects.

BLM should establish Interagency Personnel Agreements (IAS) for EIS team members and other affected agency personnel.

Providing opportunities for affected agency personnel to apprentice on BLM EIS teams will create a better understanding of how and why BLM conducts NEPA analysis.

Involve affected agencies in preliminary discussion about alternatives.

### **Improving Communications and Project Information**

*If all parties are promptly notified of BLM actions, contentions over adequate review time will be reduced. BLM will have fewer comments to respond to.*

BLM should distribute a periodic NEPA newsletter, so long as it does not distract from project work.

BLM should evaluate its public notification policy and procedures.

BLM should use e-mail to communicate about project proposals and issues. A calendar of events listing on a home page was suggested.

BLM should prepare a glossary of commonly used NEPA terms (e.g., adverse, unavoidable, risk assessment). These terms should be clearly defined (after public input) and be applied to every NEPA analysis. Existing glossaries should be used to the maximum extent possible. The glossary should be a separate document.

BLM should conduct NEPA conferences focused on issue education and problem solving. The focus of the current annual BLM/Industry conference could be broadened to meet this recommendation.

### **Improving Level-of-Analysis Decisions**

*BLM should not use preparation of an EIS as a defense mechanism. Rather the level of analysis should be consistent with the weight of impacts. This will reduce the cost and time required to comply with NEPA for individual proposals by up to 90 days.*

BLM should conduct a pre scoping interagency meeting to identify issues and determine level-of-analysis.

### **Standard Document Format and Content**

BLM should require EISs to follow a standard format, content, and preparation outline. BLM should prepare a "Master Preparation Plan" that could be supplemented to meet individual project needs.

*This recommendation will save 15 - 30 days from the NEPA schedule.*

Analysis should continue to use a conceptual approach that reflects reasonable foreseeable development. Operators seldom know the exact location or number of wells, roads, pads. However, the operator should outline the details of the project at the earliest possible time.

EISs should include an Executive Summary, a single volume NEPA analysis, and a second volume containing supporting documentation such as affected

environment descriptions, standard mitigation measures, standard construction practices, etc. The second volume could be a dynamic document that could be modified to meet individual project needs but generally would contain standard information that would not change from project to project. Referencing from the first volume to the second volume would reduce the size of volume #1.

*The 2-volume set could be mailed to agencies and affected groups. The first volume only would be mailed to other interested groups or citizens. The majority of names on the mailing list would receive only the Executive Summary. Reply card would allow recipients to request full sets of the analysis. The 'Gold Book' could serve as a start for the second volume. This recommendation would reduce the printing size of NEPA documents by approximately one-third.*

## **Recommendations for the Scoping Phase**

### **Improving the Scoping Process**

BLM should focus primarily on significant or controversial issues in NEPA documents by:

Holding annual or semiannual agency and public scoping meetings. The issues identified in these meetings would be proposed for analysis in subsequent EAs/EISs. BLM would identify these issues in the Notice to prepare the EA or EIS and announce that no project-specific scoping would be held unless requested. Scoping for individual projects would not be eliminated.

*This recommendation will save 60 days of EIS preparation.*

Preparing a 'range-of-issues' analysis. This study would classify issues for analysis in NEPA documents. Rationale for not addressing certain issues in NEPA documents would be presented in this document.

### **Improving the Scoping Period**

*These recommendations will shorten the preparation time by approximately 15 - 30 days and reduce the size of the document.*

The scoping period should be no longer than 30 days.

BLM should hold an interagency meeting with stake holders to clarify significant issues.

Once issues have been selected for analysis, the document should be shortened by limiting narrative on 'non-key' issues.

## Recommendations Concerning Data Collection and Preparation of the EIS

### Improving the Use, Accessibility, and Reliability of Data

*These recommendations would reduce the contention over the validity of data used in analysis. BLM would spend less time defending its use (or non-use of data), hence the size of the document would be reduced and it would be more readable.*

BLM can improve the use, accessibility, and reliability of data used in its NEPA analysis by:

Institutionalizing a data base clearinghouse where comprehensive data bases about resources would be maintained and available to all. These data bases would be standardized concerning format, content, and input forms. Existing data bases would be incorporated into the clearinghouse. GIS would be a central component of the clearinghouse.

Using the most practical and cost-effective means to acquire data where gaps exist. Cooperative ventures for data collection between federal, state, and local agencies; and companies; should be encouraged.

*This recommendation would reduce the cost of EIS preparation and make the distribution of preparation costs more equitable.*

Establishing proactive data collection priorities, standards, and objectives. Data collection should focus on existing and proposed fields or area where development is likely to occur. Discussions about data needs and collection requirements should be held as early as possible in the process.

Establishing data reliability criteria.

BLM could improve the efficiency and reduce the cost of data gathering for the NEPA analysis by:

Using existing data to avoid duplication.

Requiring collection of new data only if essential to assess impacts.

Providing eco-royalty relief to the proponent if BLM cannot collect the needed data and the proponent funds the effort.

*This recommendation needs further discussion to clarify the concept and application of eco-royalty relief.*

### **Improving the Draft EIS**

*These recommendations can reduce the size of EISs by 10 - 33%.*

BLM should eliminate repetition of mitigation measures at three places (Proposed Action [Chapter 2], Environmental Consequences [Chapter 4], and Mitigation and Monitoring [Chapter 5]) in EIS.

Mitigation and monitoring should be included as part of the proposed action as much as practicable, with an equal reduction in the size of Chapter 5.

Impact analysis should be based on scientific and realistic impact assessment not speculation.

Impact analysis should include the levels of expected reclamation, expected reclamation time, and the effect of restoration actions in considering cumulative effects.

BLM should limit the number of alternatives to 'real world' scenarios and within a reasonable range. The No Action Alternative would not be eliminated.

Increase the use of tiering and referencing.

BLM should clarify and finalize procedures for conducting cumulative impact assessments. These procedures should be applied consistently in all NEPA analysis.

### **Recommendations Concerning the Final EIS**

BLM should hold a post-draft/pre-final meeting with stake holders, when agreed to by affected parties.

*This recommendation could reduce the number of adverse comments on DEISs. The time required to respond to those comments and size of the document could be reduced.*

### **Recommendations Concerning the Record of Decisions and Post-NEPA Phase**

#### **Monitoring**

*These recommendations will provide information on success and suitability of mitigation measures. They will result in better results and less disagreement over what measures should be used.*

BLM should improve follow-through on activities involving mitigation and monitoring effectiveness. Use monitoring as a tool to answer questions, put concerns to rest, and refine future project practices.

BLM should establish a monitoring team to set priorities, guide and direct monitoring studies. Objectives should include, ensuring correct, current data bases, identification of data gaps that identify and address issues.

BLM should develop a handbook/manual of optimum management practices. An interagency task force should be used in developing this document.

#### **Appeals**

BLM should look for informal opportunities and creative ways to resolve disputes and provide conflict resolution to reduce the potential for appeals or lawsuits of its decisions. Conferencing opportunities should be maximized throughout the process.

*This recommendation may eliminate some appeals and allow projects to proceed in a shorter time. It may also eliminate the uncertainty associated with the appeal waiting period.*

#### **Miscellaneous Recommendations**

*These recommendations will shorten the time required to prepare NEPA documents, improve the quality of the documents, promote compliance with mitigation requirements, and reduce the cost to project proponents.*

BLM should prepare its own NEPA documents in a timely manner. The subcommittee felt, if BLM were supplied with sufficient funds and personnel, it would be most appropriate for the agency, rather than a third-party to prepare the NEPA document. It should be determined to what extent eco-royalty relief can be applied for the funding of environmental analysis.

BLM should evaluate how its NEPA documents are prepared and determine if staffing, funding and assumptions regarding third-party contracting allow for the most cost-effective, efficient, and highest quality documents.

BLM should provide its NEPA coordinators and team leaders with adequate managerial support, authority, training and education to accomplish NEPA duties.

BLM should review its list of Categorical Exclusions and add to it, those actions that have been documented, by prior NEPA analysis, to have no environmental impacts.



BLM should select single issues that are repeatedly addressed in NEPA documents (e.g., Sage Grouse populations, Big Game populations, air quality, T & E species, etc.). Analyses, focused on individual resource, should be prepared. These separate documents can serve as reference sources for future NEPA documents.

Provide greater incentives to BLM staff to participate on NEPA teams and rewards for greater efficiency and quality work on those teams.

Establish an environmental awards program to recognize exceptional industry accomplishments above and beyond legal and regulatory requirements.

Determine if some royalty monies can be directed to fund monitoring.

ACTION	TASKS	CURRENT TIME FRAME (TOTAL TIME)	RECOMMENDED CHANGES	BENEFITS	REDUCED TIME (TOTAL TIME)
PRI-PROPOSAL DISCUSSIONS	1. Define proposal 2. Determine extent of federal involvement 3. Determine Lead Agency, if necessary 4. Determine level of analysis 5. Rough out alternatives 6. Select third-party contractor	3 mos.      (3 mos.)	1. Submit project plan with standard operating practices & preferred mitigation. 2. Conduct interagency meeting to identify & determine preferred analysis. 3. More detailed & accurate summaries for public awareness	1. Early issue resolution to diffuse controversy. Reduce net impact to consider EA instead of EIS. 2. Limit analysis of peripheral issues and address them in EA. 3. Cut time and printing costs.	1.5 mos.
SCORING	1. Publish Notice of Intent 2. Develop Preparation Plan 3. Hold Scoping Meetings 4. Finalize alternatives, purpose & need, issues, and data needs	2 mos.      (2 mos.)	1. When feasible, limit scoping to 30 days. 2. Conduct interagency meetings with stakeholders. 3. Conduct area wide semi-annual scoping meeting and prepare range of issues analysis	1. Cut time spent on peripheral issues 2. Early identification of issues & concerns. Reduce possible adverse comments and BLM response time. 3. Reduce duplicative processes & the number of public meetings. 4. Documentation for not addressing issues in NEPA document to reduce document size.	1.5 mos.
DATA COLLECTION, WRITING THE DRAFT ANALYSIS	1. Conduct field studies, if necessary 2. Assemble other information 3. Write & review PDEIS 4. Select Preferred Alternative 5. Complete EIS	(5 mos.)       (9 mos.)	1. Create data base (declassification & consolidate existing data. Identify data needs & gaps) the BLM cannot conduct studies in a timely manner use eco royalty relief. 2. Mitigation described & discussed only once in EIS.	1. Eliminate duplication in collection & use of data. Early identification of data gaps. 2. Minimizes potential for project stalling due to lack of data to assess impacts. 3. Eliminate unnecessary narrative, reducing time & paper	6 mos.      (3 mos.)
DRAFT EIS	1. File EIS with EPA 2. Publish Notice of Availability 3. Hold Public Hearings 4. Analyze Public Comments	5 mos.      (14 mos.)	1. Pre final meeting with affected parties soon after release of EIS. 2. Clarify procedures for conducting cumulative impact assessment	1. Resolve conflicts. Reduce number of adverse comments & time for BLM to respond. 2. More consistency & clarity in NEPA preparation.	2 mos.      (11 mos.)
FINAL EIS	1. Write & review FFEIS 2. Complete EIS 3. Publish Notice of Availability 4. Analyze Public Comments	4 mos.      (23 mos.)	1. Where parties agree, hold post draft/pre final meetings with proponents & stake holders	1. Potential resolution of conflicts & reduction of appeals.	3 mos.      (13 mos.)
RECORD OF DECISION	1. Prepare and Issue Record of Decision	3 mos.      (26 mos.)	1. Improve follow through on activities through monitoring & mitigation effectiveness. Where BLM cannot monitor apply eco royalty relief 2. Establish a handbook of optimum management practices. 3. Look for informal opportunities & create ways to resolve disputes.	1. Better tracking of mitigation. Avoid costs & ineffective mitigation. 2. Monitoring completes NEPA cycle. 3. A baseline & tool for creative technology to reduce cost & protect the environment. Eco royalty relief used as incentive for BLM to address issues. 3. Reduce appeals & improve communication among parties with varying interests.	2 mos.      (16 mos.)